United States Court of Appeals

for the Second Circuit

APPENDIX

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74-2281

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

PENT-R-BOOKS, INC.,
Defendant-Appellant.

CONSOLIDATED APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

CONSOLIDATED JOINT APPENDIX.

Volume II—Pages 581a to 1248a.

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THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1975
(7590)

UNITED STATES COURT OF APPEALS
FILED
NOV 10 1975
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 584.

DOCKET ENTRIES

720C 584 U.S.A. vs PENT-R BOOKS, INC.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed, Deft srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and memo in suppor of motion for summary judgment filed.	3/4
11-29-73	Notice of cros s motion and memorandum insupport of deft's cross motion for summary judgment filed.	5/6
7-29-74	By DOOLING, J. - Memorandum and order dtd 7-29-74 granting summary judgment in favor of pltff & directing clerk to enter judgment filed.	7
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft to refrain from further mailings to Mrs. H. Carson etc. filed. (p/c to attys)	
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action
No.

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about March 29, 1969, defendant mailed or caused to be mailed through the U. S. mail to Mrs. B. Carson, Houston, Texas (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 2, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 1196, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about July 9, 1969, in violation of Prohibitory Order No. 1196, defendant, or someone acting

on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 14, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 1196, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On August 4, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 1196.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 1196, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- X

NOTICE OF MOTION

72 C 584

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at 9:15 o'clock in the ~~fore~~afternoon of that day, or as soon thereafter as counsel may be heard,

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

for an order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 7, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

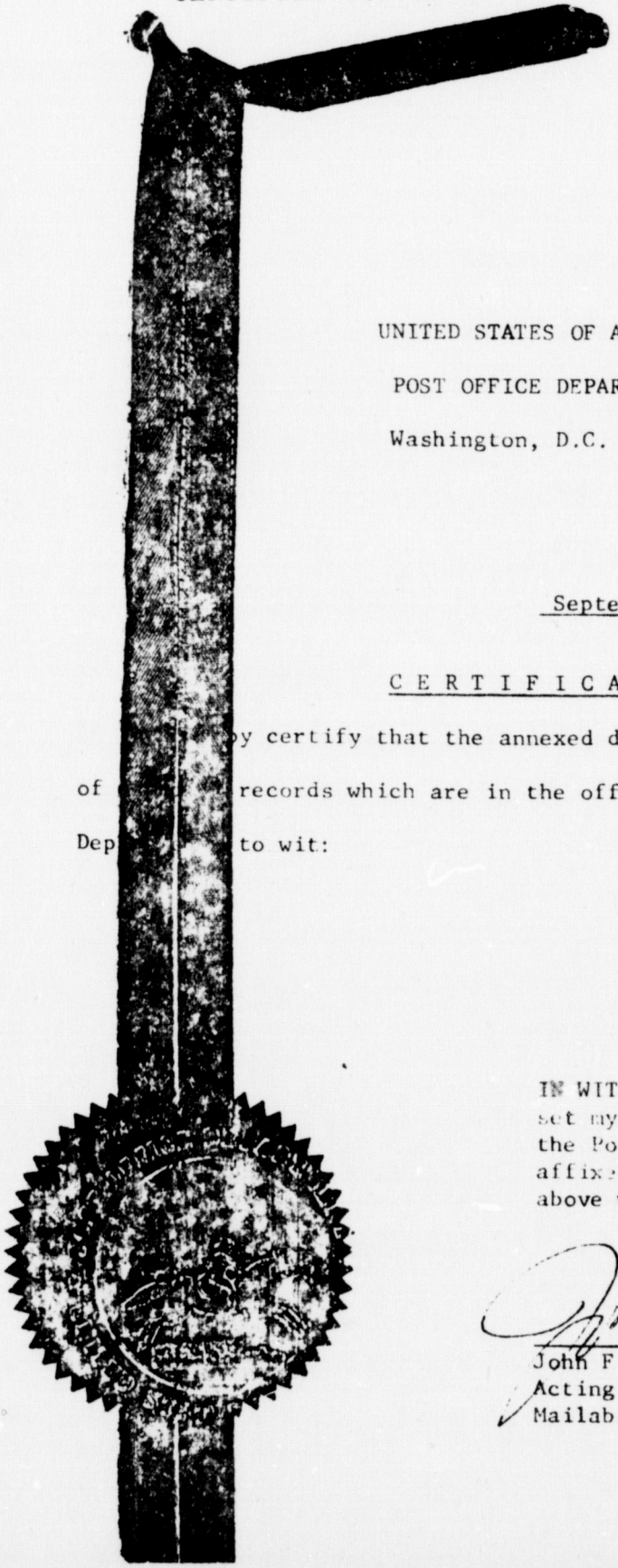
Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

GC 7336



UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

September 22, 1969

CERTIFICATION

I hereby certify that the annexed documents constitute true copies of records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

John F. Ventresco
Acting Assistant General Counsel
Mailability Division

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 1196
Issued Against

Pant-E-Hooks, Inc.

Box 81

Brooklyn, N. Y. 11223

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. R-11, H-51

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

GRANVILLE W. ELDER, POSTMASTER
BY:

Burl C. Miller
BURL C. MILLER
Postmaster

SUPT. MAILING REQUIREMENTS
HOUSTON TEXAS 77002
City State ZIP Code

[POSTMARK]

Dated: August 4, 1969

HOUSTON, TEX.
AUG
4
1969
USPO

POD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

Case No. R11H-51 (11.96)

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER
Postmaster, Attn: Postal Services Section

STREET AND NO. OR P.O. BOX
General Post Office, 401 Franklin Avenue

POST OFFICE, STATE, AND ZIP CODE
Houston, Texas 77002

POD Form 3811 Apr. 1967 c55—10—71648-10

INSTRUCTIONS TO DELIVERING EMPLOYEE

☑ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 36310

CERTIFIED NO.

INSURED NO.

DATE DELIVERED JUL 17 19

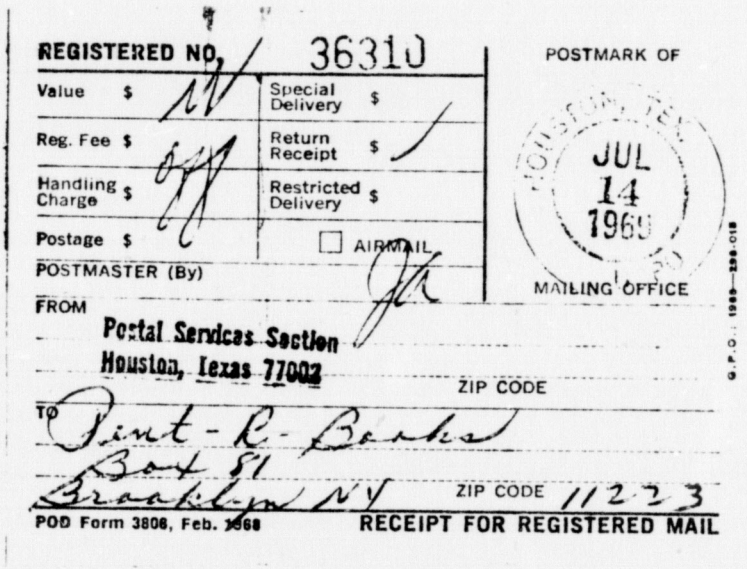
1 SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

2 SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

3 SHOW WHERE DELIVERED (*only if requested*)

c55—10—71648-10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



REGISTERED NO. 36310

POSTMARK OF

Value $ 11/

Special Delivery $

Reg. Fee $ 04

Return Receipt $ 1

Handling Charge $ 04

Restricted Delivery $

Postage $

☐ AIRMAIL

POSTMASTER (By)

MAILING OFFICE

FROM Postal Services Section
Houston, Texas 77002

ZIP CODE

TO Saint-C-Barbe
Box 81
Brooklyn NY ZIP CODE 11223

POD Form 3806, Feb. 1968 RECEIPT FOR REGISTERED MAIL

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of Prohibitory Order No. 1196
Issued Against

Pent-R-Books

Box 81

Brooklyn, N. Y. 11223

and agents or assigns.

On behalf of:

Mrs. H. Careem
Complaining Addressee

P. O. Docket No. R-11, H-51

On the 4th day of April, 19 69, you received Prohibitory Order No. 1196, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
~~2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.~~
~~3. You, or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.~~
~~4. Other (specify).~~

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, ~~in the Office of the Regional Counsel, Post Office Department, (Address)~~ with the undersigned postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

GRANVILLE W. ELDER, POSTMASTER
BY: by Mott
for BURL C. MILLER
Postmaster

SUPT. MAILING REQUIREMENTS
HOUSTON TEXAS 77002
City State ZIP Code

[POSTMARK]

HOUSTON TEX JUL 14 1969 USPO

Dated: July 14, 1969

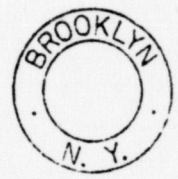
POD Form 2153
May 1968

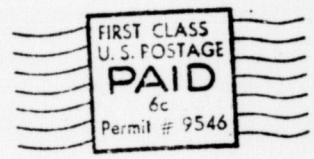
593a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P. O. BOX 81
BROOKLYN, N. Y. 11223

Received: 7-9-69
By: Mrs. H. Carson





FIRST CLASS MAIL

Mrs. H. Carson
1814 Fairwind Rd.
Houston, Texas 77058

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, Mrs. L. Carson (Print), addressee [parent of minor addressee] of the enclosed mailing from Pen-R Books, Inc.; P.O. Box 61 Brooklyn, N.Y. 11223 (+ P.O. Box 1555, NY 10017), consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Mrs. L. Carson (Signature) 7-9-69 (Date)

1814 Fairwind Ln. (Street)

Houston, Texas (City, State) 77055 (ZIP Code)

NAMES OF CHILDREN	BIRTH DATE
Kirk Carson	Nov. 27 1959

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

595a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1814 Fairwind Rd.
Houston, Texas 77058
July 9, 1969

Dear Sir:

The enclosed form is the last one that I have of those you mailed to me .

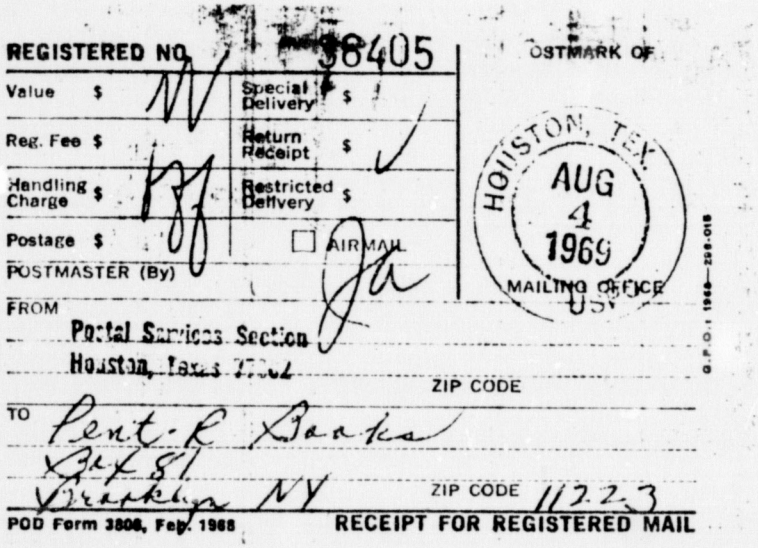
Since I'm continuing to receive more mail from this company I would appreciate it if you would send me more forms for future use.

Thank you very much.

Sincerely,

Mrs. H. T. Carson

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



REGISTERED NO. 38405

POSTMARK OF

Value $ NV

Special Delivery $

Reg. Fee $

Return Receipt $ ✓

Handling Charge $ 85

Restricted Delivery $

Postage $

☐ AIRMAIL

POSTMASTER (By)

HOUSTON, TEX. AUG 4 1969 MAILING OFFICE U.S.

FROM

Postal Services Section

Houston, Texas 77001 ZIP CODE

TO Pent-R Books

Box 81

Brooklyn NY ZIP CODE 11223

POD Form 3806, Feb. 1968 RECEIPT FOR REGISTERED MAIL

G.P.O.: 1968—259-015

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

NEW YORK, NY
APR 4
PM EH

SAVE
WATER

1969 Case No. NY64

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

Postmaster, Attn: Postal Services Section

STREET AND NO. OR P.O. BOX

Federal Post Office, 401 Franklin Avenue

POST OFFICE, STATE, AND ZIP CODE

Houston, Texas 77002

POD Form 3811 Apr. 1967

e55—16—71848-10

INSTRUCTIONS TO DELIVERING EMPLOYEE

☑ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 36113

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

APR 4 1969

1 SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

Agt SC

2 SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

3 SHOW WHERE DELIVERED (*only if requested*)

Delivered thru Rendsm #40
at Grand Central Sta

e55—16—71848-10 GPO

REGISTERED NO. 36113

Value	$ NV	Special Delivery	✓
Reg. Fee	$	Return Receipt	$ ✓
Handling Charge	$ Off	Restricted Delivery	$
Postage	$ 0 0	☐ AIRMAIL	

POSTMASTER (By)

POSTMARK OF

HOUSTON, TEX.
APR 2 1969
MAILING OFFICE

FROM

ZIP CODE

TO Gent R. Brook
[illegible] 1550 Ave of Cen. St
N Y N Y 10017

ZIP CODE

POD Form 3806, Feb. 1968

RECEIPT FOR REGISTERED MAIL

G.P.O.: 1968—276-013

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

Pent-R-Books
Mailer
Box 1555 Grand Central Station
New York, New York, 10017
and agents or assigns

PROHIBITORY ORDER

NO 1196

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Mrs. H. Carson
(Name of Addressee)

1814 Fairwind Rd. Houston, Texas, 77058
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Mrs. H. Carson — Ronald Keith Carson

ADDRESS: 1814 Fairwind Rd.
(Street)

Houston *(City)* — Texas *(State)* — 77058 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

GRANVILLE W. ELDER, POSTMASTER
BY:
BURL C. MILLER
SUPT. MAILING REQUIREMENTS
HOUSTON, TEXAS, 77002
City State ZIP Code
Postmaster

[POSTMARK]

HOUSTON, TEX. APR 2 1969 USPO

Dated: April 2, 1969

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PUBLIC LAW 90-206 **December 16, 1967**

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

4-1-69

600a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, Mrs. H. Carson (Print), addressee [parent of minor addressee] of the enclosed mailing from Pent-R-Books, Box 1555, Grand Central Sta., (Print) New York, New York, 10017 ; Box 81, Brooklyn, N.Y. 11203 consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Mrs. H. Carson (Signature) March 24, 1969 (Date)

1814 Fairwind Rd. (Street)

Houston, Texas, 77058 (City) (State) (ZIP Code)

NAMES OF CHILDREN	BIRTH DATE
Ronald Keith Carson	11-22-52

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1814 Fairmont Rd.
Houston, Texas 77058

Postal Services Section
United States Post Office
Houston, Texas 77002

Postmaster:

I received the enclosed advertisement which I consider to be pandering advertisement offering for sale erotically arousing or sexually provocative "matter", and I do not wish to be the recipient of any further matter from them.

This material was not requested by me.

Anything you can do to have this stopped will certainly be appreciated.

Sincerely,
[redacted] A. D. Cason

602a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

[illegible] WITH YOUR SPECIAL MONEY BACK GUARANTEE!!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)

Please check appropriate box!

- ☐ Please ship book and place my name on your mailing list
- ☐ I am not ordering at this time but place my name on your mailing list
- ☐ Remove my name from your mailing list

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

35

Mrs. H. Carson
1814 Fairwind Rd.
Houston, Texas 77058

559

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PENT-R BOOKS INC.

Gentlemen:

Enclosed please find $ .....

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

PENT-R BOOKS INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

BROCKLYN N. Y.

FIRST CLASS U.S. POSTAGE PAID 6c Permit # 9546

FIRST CLASS MAIL

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

NOW AVAILABLE FOR THE FIRST TIME ANYWHERE!

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

AMERICA'S FIRST COMPLETE "SEX COURSE" IN ONE VOLUME!

NOW FOR THE FIRST TIME, THE MYSTERY OF SEX IS UNLOCKED THROUGH THE AID OF OVER 150 ACTUAL PHOTOGRAPHS OF A LIVE MAN AND A LIVE WOMAN TOGETHER ENGAGED IN SEXUAL INTERCOURSE POSITIONS!

DOES AMERICA NEED A

PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL?

PENT-R BOOKS INC. P.O. BOX 1555, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the troop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old wives tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL, we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes! . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" without photographs would be a dis-service to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We suggest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

With my sincere personal good wishes,

Ronald Alvin

Ronald Alvin

P.S.

This book cannot now be obtained in any book store or from any other mail order firm. It is presently only available from the publisher, Pent-R Books Inc.

Copyright — 1969 Pent-R Books Inc.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. I.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you: this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

OUR GUARANTEE

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If, after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!
ONLY $9.98
SPECIAL PRE-PUBLICATION LIMITED TIME OFFER

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ . . . . . .
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

☛ . . . . . .
signature

Print Name. . . . . Age. . . .

Address. . . . . .

City. . . . . State. . . . . Zip. . .

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No. 72 C 583

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

Herbert Monte Levy

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 583

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO)

would be a useless order. As shown by the annexed affidavit of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding

an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

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> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required

by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an

advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order. it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

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As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

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The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back

of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they

had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

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In this connection, I note also that in this very case, the Postmaster twice denied ever receiving my demand for hearing, though I sent it twice. See annexed correspondence. The Post Office should not gain advantage by its inefficiency.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is <u>not</u> the one who has either actual or legal custody of the record. On the contrary, "Files relating

to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

The copy of the certification furnished to defense counsel is not even a purported certification of the administrative file in this case. A totally different file is certified. Therefore, there is not a scintilla of evidence or facts furnished by the Government in the case at bar to warrant summary judgment; on the contrary, in the complete absence of any admissible evidence, the summary judgment motion by the Government must be denied, and summary judgment awarded to defendant.

Amongst the papers submitted to the Court is what purports to be a return receipt executed by defendant, for the particular prohibitory order involved in this case. However, there is simply nothing whatsoever to tie in that particular return receipt with the particular prohibitory order. In this connection, it should be noted that this particular defendant has

received approximately 200,000 Prohibitory Orders. The Post Office had issued approximately 325,000 Prohibitory Orders by December 31, 1969. Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161. It would thus be the easiest thing in the world for the Post Office to have mixed up a particular prohibitory order with a return receipt for another prohibitory order, or with a return receipt for a complaint, or with a receipt for virtually any communication between the Post Office and the defendant, -- or between others -- and to have annexed that to the prohibitory order as the purported receipt for the particular prohibitory order. In the complete absence of any identification whatsoever of the return receipt being a return receipt for the particular prohibitory order, there is simply no proof whatsoever as to either the receipt of the prohibitory order by the defendant or of the date of such receipt. In the absence of proof as to receipt and/or date of receipt, obviously there can be no finding of a violation of that prohibitory order which would have become effective 30 days from the date of its receipt. Since there is no showing of the fact of receipt or the date of receipt, it is thus impossible to show what was the effective date

of the order, and therefore impossible to show whether or not there had been a violation by a second mailing, assuming at this moment that a second mailing had been made.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly requires the Postmaster General to issue the order.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of Martin J. Barnes . However, the second alleged mailing was

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not to such person, but was addressed to a different name, to wit, M. Byrnes , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

The prohibitory order prohibited a mailing to a street address of 1194 Apple Hill Rd. . However, the second alleged mailing was to a totally different street address, to wit, 7123 Vine St. . Thus, there was clearly no violation of the prohibitory order.

The prohibitory order prohibited a mailing to an address with zip code 45230. However, the second alleged mailing was to a totally different zip code, to wit, 45216 . Thus, there was clearly no violation of the prohibitory order. This is a particularly significant factor inasmuch as nailers sort out their nailing by zip code, as did the nailer who is defendant here. Having been given an incorrect zip code, it would thus have been completely impossible to even locate by computer, or otherwise, the information necessary to delete the name and address of the addressee. The identical address using two different zip codes would of course be a totally different

address; in other words, 120 West 13th Street and a zip code which is a Brooklyn zip code would be a totally different address than 120 West 13th Street in another city or another borough with a different zip code.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of

the order is 30 days after it has been [illegible] that there is no presumption of a violation [illegible] the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on April 11, 1969 and that the second alleged mailing was received by the addressee on May 22, 1969 -- being a difference of less than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption, it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to,

and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given

notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

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> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to

look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in

that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this

position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

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In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

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Quite apart from the unreasonableness of the presumption in the case at bar generally, the presumption simply does not apply where, as in the case at bar, it is apparent that the second alleged mailing was forwarded to a different address, since forwarding can, notoriously, take weeks or months, and the presumption thus becomes entirely unreasonable.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the order was issued by a local Postmaster.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been

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made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
6th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19.....

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

295 Madison Avenue
MU 9-
2-2220

June 25, 1969

Postmaster Joseph J. Scanlon
Cincinnati, Ohio 45202

Re: Pent-R Books, Inc.
ads: P. O. (Byrnes)
P. O. Docket # CIN-435

Dear Mr. Scanlon:

We represent Pent-R Books, Inc. which has received your complaint in the above entitled matter dated June 10, 1969. We hereby demand a hearing, and further request that this matter be consolidated with the many other Pent-R Books matters pending across the Country, and removed to New York for hearing. In support of this request, we enclose herewith a copy of a letter sent on behalf of another client to a postmaster, dated February 4, 1969, as well as a copy of an answer filed in a pending case involving yet another client; we hereby incorporate by reference all points made in the enclosed, and make the same demands, requests, inquiries and objections as are made in such enclosed papers. To aid in the coordination of the numerous Pent-R Books cases pending across the Country, which involve the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

Furthermore, we move to dismiss the complaint herein for the following reasons:

1. The Prohibitory Order which you refer to is not annexed to the complaint.

2. The date of the alleged second mailing is not set forth in the complaint.

3. Neither the original nor the alleged second mailing to the addressee is attached as an exhibit.

Failure to advise of this information violates client's Fifth Amendment rights to due process and Sixth Amendment rights to be advised of the nature and cause of the accusation. Not only can we not tell whether the Prohibitory Order prohibited the mailing claimed to have violated it, but we know nothing about the alleged second mailing and are given no information in regard thereto. Under such circumstances, any intelligent defense is virtually impossible. We accordingly demand the dismissal of the complaint.

Very truly yours,

HML/s
Enclosures

HERBERT MONTE LEVY

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 1649
Issued Against

Pent-R-Books Inc.

P.O. Box 1555 Grand Central Sta

New York, NY 10017

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. CIN-435

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

Joseph J. Scanlon
Postmaster

City State ZIP Code

[POSTMARK]

CINCINNATI JUL 7 1969 OHIO

Dated: July 7, 1969

POD Form
May 1968 2154

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

July 11, 1969

Postmaster Joseph J. Scanlon
United States Post Office
Cincinnati, Ohio 45202

Re: Pent-R-Books, Inc. ads. P.O. (Byrnes)
P. O. Docket No. CIN-435

Dear Mr. Scanlon:

Client has received your order in the above matter reciting that satisfactory evidence has been presented that would client act in violation of the Prohibitory Order, and that you are in communication with the Attorney General in regard to the matter.

I am at a loss to understand this. The original Complaint was not received in the New York Post Office according to the stamps on the envelope until June 11. Even if my client received it the same day it was received in the New York Post Office--which is highly unlikely--I note that I sent a demand for hearing on June 25, 14 days after receipt date. Enclosed herewith is a Xerox copy of my letter of June 25. Thus, due demand was made for this, and there was no reason to take a default. If for some reason my demand for this was lost in the mail, the Post Office cannot take advantage of this fact nor can they if it was delayed in the delivery.

I am sending a copy of this letter, together with a copy of the enclosure to the Attorney General, since under the circumstances an application for a court order should not be made.

Very truly yours,

Herbert Monte Levy, Esq.

HML.:mh

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

295 Madison Avenue
MU 7-
MIX 2-2220

June 25, 1969

Postmaster Joseph J. Scanlon
Cincinnati, Ohio 45202

Re: Pent-R Books, Inc.
ads: P. O. (Byrnes)
P. O. Docket # CTB-435

Dear Mr. Scanlon:

We represent Pent-R Books, Inc. which has received your complaint in the above entitled matter dated June 10, 1969. We hereby demand a hearing, and further request that this matter be consolidated with the many other Pent-R Books matters pending across the country, and removed to New York for hearing. In support of this request, we enclose herewith a copy of a letter sent on behalf of another client to a postmaster, dated February 4, 1969, as well as a copy of an answer filed in a pending case involving yet another client; we hereby incorporate by reference all points made in the enclosed, and make the same demands, requests, inquiries and objections as are made in such enclosed papers. To aid in the coordination of the numerous Pent-R Books cases pending across the Country, which involve the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

Furthermore, we move to dismiss the complaint herein for the following reasons:

1. The Prohibitory Order which you refer to is not annexed to the complaint.

2. The date of the alleged second mailing is not set forth in the complaint.

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

3. Neither the original nor the alleged second mailing to the addressee is attached as an exhibit.

Failure to advise of this information violates client's Fifth Amendment rights to due process and Sixth Amendment rights to be advised of the nature and cause of the accusation. Not only can we not tell whether the Prohibitory Order prohibited the mailing claimed to have violated it, but we know nothing about the alleged second mailing and are given no information in regard thereto. Under such circumstances, any intelligent defense is virtually impossible. We accordingly demand the dismissal of the complaint.

Very truly yours,

HML/s
Enclosures

HERBERT MONTE LEVY

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

ice of
tmaster

UNITED STATES POST OFFICE
Cincinnati, OH 45202

IN REPLY REFER TO
JJS:JST:ac

July 25, 1969

Mr. Herbert Monte Levy
295 Madison Ave.
New York, New York 10017

Dear Mr. Levy:

RE: Pent-R-Books, Inc. ads. P.O. (Byrnes)
P. O. Docket No. CIN-435

With reference to your letter of July 11, a search of our files regarding this case has failed to reveal any record of your demand for a hearing which you say was dated June 25. Furthermore, the Xerox copy of the referred to demand for hearing was not enclosed with your letter of July 11,1969.

Since no evidence of additional correspondence is available, this office must proceed in accordance with the law and submit the evidence to the Post Office Department General Counsel.

Sincerely,

Joseph J. Scanlon

Joseph J. Scanlon
Postmaster

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

72 C 583

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for"The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances,

we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without

any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

AFFIDAVIT OF RICHARD S. SCHWARTZ

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer

house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous

steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of

1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defend- and (and its computer house) have done a superlative job.

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* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and

then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

AFFIDAVIT OF RICHARD S. SCHWARTZ

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing

lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof

would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30

days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

AFFIDAVIT OF RICHARD S. SCHWARTZ

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had

pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st,

etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

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* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

AFFIDAVIT OF RICHARD S. SCHWARTZ

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though th second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken

precautions which result in eliminatic of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that

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* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has

become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

AFFIDAVIT OF RICHARD S. SCHWARTZ

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:
> 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case absolutely no exhibit whatsoever was annexed to the complaint.

AFFIDAVIT OF RICHARD S. SCHWARTZ

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived defendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBIT, ANNEXED TO DEFENDANT'S CROSS-MOTION.

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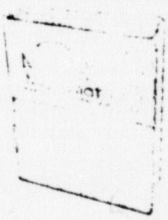

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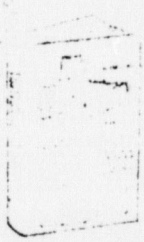

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Enclosed is $____ in ☐ check or ☐ money order. Add 35¢ for shipping & handling on orders less than $10.00. N.Y. residents add applicable sales tax.

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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Huf, photographer from Holland; Martin Dubey, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Philippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and Jodi Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for [illegible]ture of Vietnamese mother fleeing enemy attack. ○

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necessarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman

HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Gilson Safdeye

GILSON SAFDEYE
Notary Public, State of New York
No. 24-[illegible]476
Qualified in Kings County
Commission Expires [illegible] 19[illegible]

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

: 72 C 584
-against- (CARSON)
:

PENT-R-BOOKS, INC., MEMORANDUM
: and
Defendant. ORDER

- - - - - - - - - - - - - - - - - - - -X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609 , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

was ignored. It was not mailed to the Postmaster at Houston, Texas, from New York City until fifteen days after the receipt of the complaint. In this case, moreover, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York

July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - -X
UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.
- - - - - - - - - - - - - - - - - - - -X

72 C 584
(CARSON)
JUDGMENT

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC. its agents and assigns (1) refrain from any further mailings MRS. H. CARSON, 1814 Fairwind Rd., Houston, Texas 77058,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-n party from all mailing lists owned or controlled by it, its

JUDGMENT

agents or its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

- -X

CIVIL ACTION NO. 72C 586.

DOCKET ENTRIES

72C 586 U.S.A. v. PENT-R BOOKS, INC.

DATE	FILINGS--PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed, Deft srvd 5-25-72.	2
9-27-73	Notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	5/6
7-29-74	By DOOLING, J. - Memorandum and order dtd 7-29-74 granting pltff's motion for summary judgment & directing Clerk to enter judgment dismissing complaint filed.	7
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft to refrain from mailings to Rev. H.Q. Griffis etc. filed. (p/c to attys)	8
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

- X

COMPLAINT

Civil Action No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about March 24, 1969, defendant mailed or caused to be mailed through the U. S. mail to H. Q. Griffis, Hampton, South Carolina (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on March 26, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 1322, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 3, 1969, in violation of Prohibitory Order No. 1322, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

COMPLAINT

11. On June 16, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 1322, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On November 12, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 1322.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

COMPLAINT

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 1322, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- X

NOTICE OF MOTION

72 C 586

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard,

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

for an order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:
HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

December [illegible], 19[illegible]

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: [illegible]

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 1322
Issued Against

Pank-R Books, Inc.

Box 1555, Grand Central Station

New York, N. Y. 10017

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. Co-32769-1322-203

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

J. W. Douglas
J. W. Douglas
Postmaster

Columbia, S. C. 29201
City State ZIP Code

[POSTMARK]

Dated: Nov. 12, 1969

POD Form
May 1968 2154

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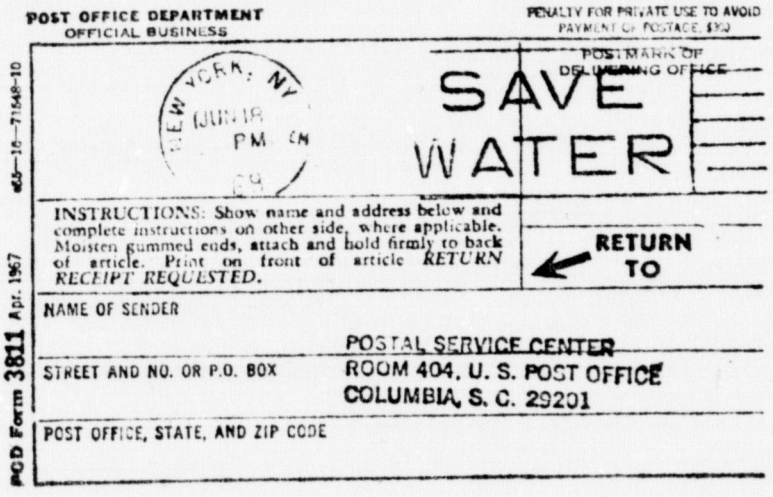
POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

NEW YORK, NY JUN 18 PM

POSTMARK OF DELIVERING OFFICE

SAVE WATER

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and hold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

POSTAL SERVICE CENTER
ROOM 404, U. S. POST OFFICE
COLUMBIA, S. C. 29201

STREET AND NO. OR P.O. BOX

POST OFFICE, STATE, AND ZIP CODE

PS Form 3811 Apr. 1967

*U.S.—16—71548-10

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

V 1322

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. C1833

CERTIFIED NO.

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED JUN 18 19[illegible]

SHOW WHERE DELIVERED (*only if requested*)

A. L. Golden

e55—16—71548 10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 1322
Issued Against

Pent-R Books, Inc.

Box 1555, Grand Central Station

New York, N. Y. 10017

and agents or assigns.

On behalf of:

Rev. H. Q. Griffis
Complaining Addressee

P. O. Docket No. Co-32769-1322-203

On the 27th day of March, 19 69, you received Prohibitory Order No. 1322, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. ~~You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.~~
3. ~~You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.~~
4. ~~Other (specify):~~

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, ~~(address)~~, ~~with the undersigned postmaster~~, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK]

Dated: June 16, 1969

J. W. Douglas
Postmaster

Columbia, S. C. 29201
City State ZIP Code

POD Form 2153
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE!

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents.

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that very few other books offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

OUR GUARANTEE

TRY IT ... DON'T BUY IT ... With our money back offer! We have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your knowledge of sex and if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. Please act today! A postage paid reply envelope is enclosed for your convenience. And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money will be returned without question or delay! Please order today! Both you and your wife will be glad that you did!

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The regular price of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is $12.98. This is the price that book stores throughout the country and many mail order firms are selling this book for. To the people who were unable to take advantage of our special pre-publication $9.98 offer, we are making this "First Edition Special Offer" for a limited time only. You may purchase "The Photographic Manual Of Sexual Intercourse" with Handsome Kivar Binding for only $9.98 and save $3 for a limited time only. This special offer may not be repeated again! You may have one chance and one chance only to take advantage of this tremendous offer. Please order today! We have books in stock for immediate shipment. Our money back guarantee of course still applies!

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98

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- 256 Pages Printed On The Finest Heavy Weight Pure White Book And High Gloss Enameled Paper!
- Handsome Kivar Binding (Special Deluxe Binding Also Available)
- Over 150 Actual Photographs In Black & White And Full Color
- 40 Full Page Photos & 16 Full Page - Full Color Photos!

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER
No Books Will Be Shipped To Unmarried Minors!

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE
(C.O.D. Orders Accepted But Must Be Accompanied By A $5 Deposit.)

PENT-R BOOKS, INC. P.O. BOX 1555
Grand Central Station, New York, N.Y. 10017

Gentlemen:

Please rush me in plain sealed wrapper _____ copies of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

[ ] Regular Edition, Handsome Kivar Binding $9.98
[ ] Deluxe Edition, Gold Stamped Clothbound Library Volume $12.98
[ ] I have enclosed $ _____ [ ] Cash [ ] Check [ ] Money Order
[ ] I have enclosed $2. Deposit. Please ship C.O.D.

I understand that if I am not completely satisfied, I may return the book within 7 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

_____
Signature

Print Name _____

Address _____

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

ACK & WHITE PHOTOGRAPHS ETTER MARITAL PARTNER!

Too many married couples are in the doldrums of on-again off-again "quickie" unembellished intercourse with no variations and no experimentations! This book will take you out of the sexual rut and into the sunshine of fresh new youthful exciting sexual activity!

IMAGINE YOURSELF CONSISTENTLY SATISFYING YOUR SEXUAL PARTNER FAR BEYOND HER OR YOUR WILDEST SEXUAL EXPECTATIONS!

Why not enjoy all the wholesome healthy thoroughly satisfying sexual delights that are available to you and your sexual partner? It's all so easy and so natural provided you forget the prejudices and fallacies of the bygone eras and recognize the fact that just as there is more to life than eating and sleeping, so there is more to sex than mere "quickie" intercourse! And this is precisely the point this book brings home to you with absolute clarity, detail and the frankest most up-to-date and modern information that is available to the adult general public!

THIS IS NOT A LONG-WINDED BOOK OF DULL THEORY!

The "Photographic Manual of Sexual Intercourse" is a clear, live, dynamic, detailed "HOW TO DO IT" manual of step-by-step practical instruction. It teaches you in plain language, direct and

THIS BOOK HAS ONE MAIN PURPOSE

This book has one main purpose, to teach you how derive the utmost pleasure, excitement, sensatio ecstasy and satisfaction from sexual intercourse. It definitely NOT written for persons seeking cheap thr or those seeking to "ogle" at pictures of persons engag in sexual intercourse!

WHAT THIS BOOK CAN DO FOR YOU

1) It can help you develop a healthy life long attitude tow sex! This healthy attitude can improve your general heal both mental and physical!
2) It can help you learn how to become a successful "lov husband" and help you to achieve greater success a happiness in every aspect of your business and personal li
3) It can help you learn how to experience maximum sex satisfaction from the sex act.
4) It can help you learn how to correct any problem of sex incompatibility in your marriage! You can learn what can certain sexual problems and complications and how to avo and deal with them.
5) It can help you learn the secret of enjoying sex love happin in the years ahead. How to keep the fire burning and how keep your sex life from becoming dull and monotonous!

You can learn numerous ways to prolong the act of intercour You can learn how to help your wife to achieve a fuller orga How to arouse her to new found passion and how she can learn arouse you to a new vitalized sexual relationship. You and y wife can both learn through words and photographs what to and what NOT to do to become a more accomplished lover sex partner.

And Now, you can also learn with the aid of text photographs, how to obtain complete sexual satisfaction e WHEN INTERCOURSE IS NOT POSSIBLE!

This is one of the very few books that offers to the general pu public complete detailed chapters on "FEMALE ORAL-AN SEXUALITY" "MALE ORAL-ANAL SEXUALITY" "SATISFYING SUBSTITUTES FOR SEXUAL INTERCOURS "SEXUAL INTERCOURSE FOR THE OLD, ILL, A HANDICAPPED!"

Yes, this is practically a complete guide to a happier sex love for married couples! This is the HOW TO DO IT book in marriage and sexual arts! It makes most other text on the subj obsolete!

SEXUAL KNOWLEDGE IS SEXUAL POWER!

The vivid detailed photographs in this book show with utm clarity how to adjust postures for the best possible matching organs, how to make the sexual side of marriage more vibrant introducing a variety of caresses and positions into the sexual Men and women with sexual knowledge are men and women w power to bring satisfaction and fulfillment to their love partn as well as to themselves. The Photographic Manual Of Sex Intercourse" will give you the knowledge and power to maste

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

A BREAKTHROUGH IN SEX EDUCATION

No dolls, no drawings, no illustrations, no pencil sketches, no partially obscured over-printed photographs, no tracings where one sheet must be placed upon another, no men and women wearing skin tights, no tricks where men and women appear in the photographs separately! Now, for educational purposes only, over 100 coital positions are clearly photographed for instruction purposes in over 150 large clear photographs of a real living nude man and a real living nude woman, a married couple, together engaged in sexual intercourse positions with accompanying descriptive text in the most sophisticated, modern and up-to-date sex manual ever published!

AVAILABLE FOR THE FIRST TIME TO THE ADULT, GENERAL PUBLIC

This brand new just published giant compendium of sex you will find one of the most informative, educational, instructive, eye-opening and mind clearing sexual manuals that you have ever seen or read. It offers the frankest, clearest, most detailed and explicit information through words and actual photographs on **"HOW TO ENGAGE IN SEXUAL INTERCOURSE"** that has probably ever been written! Over 100 coital positions are frankly described in plain language and photographed in over 150 **FULL COLOR AND BLACK & WHITE DETAILED PHOTOS!**

THERE HAS NEVER BEEN A BOOK LIKE THIS BEFORE!

Many will call "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" America's First Sex Course." Because for you and your wife, that is exactly what it can be. A step by step specific course in words and clear concise photographs of how to engage in the many forms of physical love and sexual intercourse! It can turn dull confused routine "quickie" sex into exciting sexual episodes which continue to improve each time and provide far greater degrees of pleasure and satisfaction then you or your wife ever thought possible!

Here at last, are the techniques which can transform the staleness apathy and boredom of the marital act into a series of invigorating refreshing, fulfilling experiences . . . each more thrilling than the last!

The Photographic Manual Of Sexual Intercourse will teach you step by step, in minute detail, each touch, each movement, each kiss, each sensitive area of the body, each technique available to you for giving your mate and yourself new heights of sexual enjoyment and contentment. More, in fact, than you ever thought possible!

NOW! Learn from down to earth solid straight no-punches pulled plain language facts and over 150 clear educational Full Color and Black and White photographs the unusually helpful facts you should know about the many varied aspects of sexual intercourse!

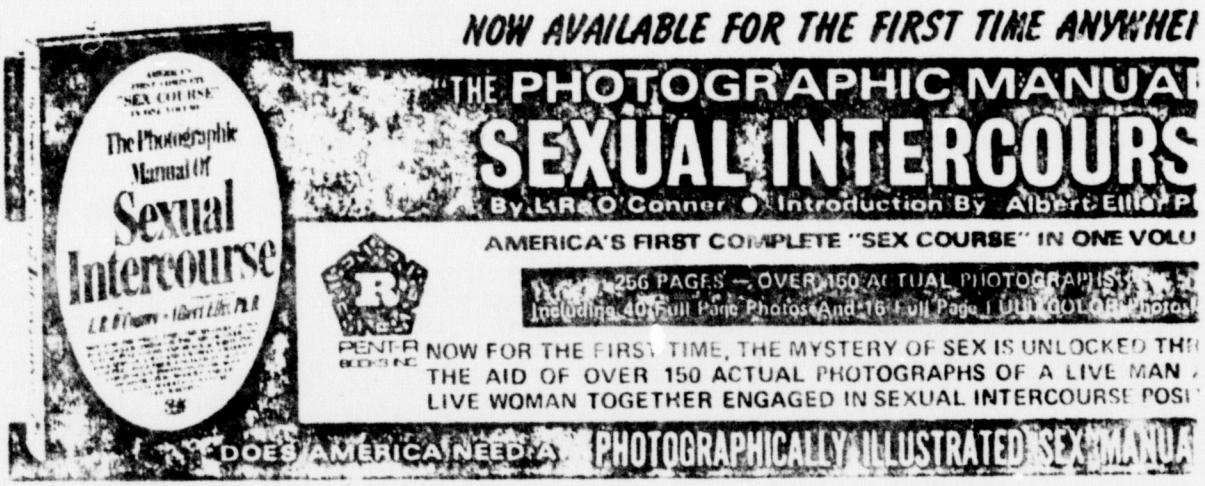
THIS BOOK IS SO FANTASTIC SO MODERN IN HOW

OVER 150 FULL COLOR AN
SHOW YOU HOW TO B

Now for the first time in any book . . . you can see with your own eyes, in large full color and black and white actual photographs the best positions to use for a wide variety of special purposes sensual effects!

- Discover the positions that narrows the vaginal op ing, giving the man more stimulation!
- Learn the position that automatically forces woman's thighs to add to penile stimulation!
- Discover the positions which most directly excite clitoris!
- Find out what position holds the male organ at climax, preventing rapid contraction of the organ!
- Learn the position that allows the penis to penetrate the neck of the uterus while at the same time provid even more sensation from the caressing touch of scrotum moving upon the woman!
- Learn the position that holds a partial erection m firmly!

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal o school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education t their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the stoop, th candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear story of someones sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old wives tale, every untruth every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands t take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, n one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck o playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something privat something personal, something one person does not quickly reveal to another. In far too many cases a person remains silent remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarit pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one top in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOE AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL we ask again? We think yes, most definitely yes a we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes . . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning, in ju about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to th reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her ow conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" witho photographs would be a disservice to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 2 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adu who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even wit years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexu pleasures, complete sexual satisfaction and to re-pire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form fo your convenience.

We suggest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE", read it, show it t your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediat refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

PENT-R BOOKS INC. P.O. BOX 1555

With my sincere personal good wishe

693a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

June 3, 1969

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

694a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*FIRST EDITION SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box:

- ☐ Please ship book and place my name on your mailing list.
- ☐ I am not ordering at this time but place my name on your mailing list.
- ☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

121 [illegible] SC 29624

*You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Please send me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the First Edition Special price of only $9.98 per copy. I am over the age of 21 years and have signed the statement on the left to that effect. I understand that if I am not completely satisfied I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

☐ Regular Edition: Handsome Kivar Binding only $9.98

☐ Deluxe Edition: Gold-Stamped Casebound Library Volume only $12.98

☐ I have enclosed $ _____ ☐ Cash ☐ Check ☐ Money Order

☐ I have enclosed a $2 Deposit. Please ship C.O.D.

SAVE MONEY! Enclose full payment and save Postage and C.O.D. fee.

PERSONAL

FIRST CLASS MAIL

PENT-R BOOKS, INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

JUN 4 1969

PAID
FIRST CLASS
U.S. POSTAGE
6¢

BROOKLYN N. Y.

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a most intimate manual. If you do not wish this mail or if you are not over the age of 21 years DO NOT OPEN THIS ENVELOPE. Simply mark this envelope "REFUSED", sign your initials and let it rest to your mailman. He is the fellow to whom we shall endeavor to remove your name from our mailing list. THANK YOU.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES GOVERNMENT

Memorandum • POST OFFICE DEPARTMENT

SUBJECT: Prohibitory Order.

DATE: June 3, 1969

FROM: Postmaster - Hampton, S. C. 29924

IN REPLY REFER TO:

P.O.CL: 1

JUN 4 1969

YOUR REFERENCE:

TO: Postmaster
Columbia, S. C. 29924

Attached is a copy of Prohibitory Order (POD Form 2152) dated March 26, 1969 filed on behalf of Rev. H. Q. Griffis, Rt 1, Box 8, Hampton, S. C. 29924. This order directed PENT-R Books, Inc., Box 1555, Grand Central Station, New York, N. Y. 10017 not to mail any further literature to Rev. Griffis.

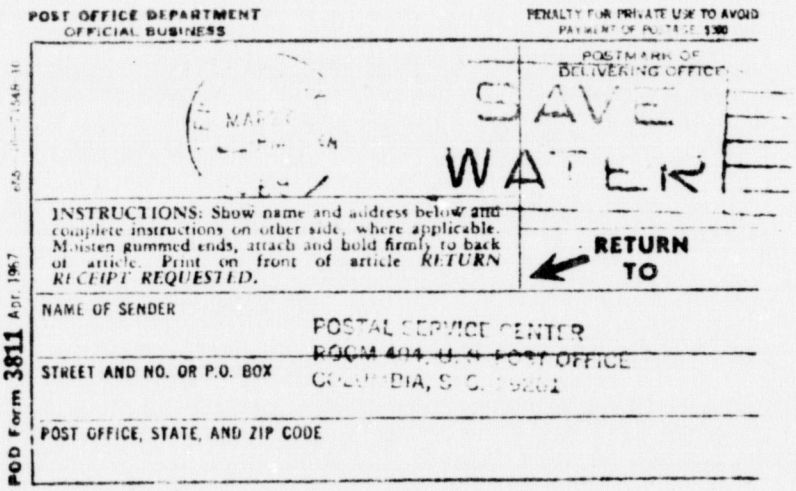
Mr. Griffis has received another piece of mail from PENT-R Books, Inc. and has dated and initialed each item inclosed in the envelope in order that he may identify it in the future if required to do so. Thatpiece of mail and the contents of the envelope is being sent to you for whatever action deemed necessary.

Rev. Griffis is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it.

Cecil E. Mason, Postmaster

cc Rev. H. Q. Griffis
Rt. 1, Box 8
Hampton, S. C. 29924

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS


POST OFFICE DEPARTMENT
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

POSTMARK OF DELIVERING OFFICE

SAVE WATER

INSTRUCTIONS: Show name and address below and complete instructions on other side, where applicable. Moisten gummed ends, attach and fold firmly to back of article. Print on front of article *RETURN RECEIPT REQUESTED.*

RETURN TO

NAME OF SENDER

POSTAL SERVICE CENTER
ROOM 404, U.S. POST OFFICE
COLUMBIA, S. C. 29201

STREET AND NO. OR P.O. BOX

POST OFFICE, STATE, AND ZIP CODE

POD Form 3811 Apr. 1967

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1322

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 0 1258

CERTIFIED NO.

INSURED NO.

1 SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

2 SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED MAR 21 1950

SHOW WHERE DELIVERED (*only if requested*)

55—16—71048-10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

PENT-R Books, Inc.
Mailer
Box 1555, Grand Central Station

New York, N. Y. 10017
and agents or assigns

PROHIBITORY ORDER NO. 1322

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Rev. H. C. Griffis
(Name of Addressee)

Rt. 1, Box 6, Hampton, S. C. 29924
(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Rev. H. C. Griffis

ADDRESS: Rt. 1, Box 6
(Street)

Hampton *(City)* S. C. *(State)* 29924 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

MAR 26 1969

Dated: March 26, 1969

J. W. Douglas
Postmaster

City Columbia, S. C. State 29201 ZIP Code

J. W. Douglas
Supt. of Office Services

POD Form 2152
May 1968

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, H. L. Griffis (Print), addressee [~~addressee~~] of the enclosed mailing from Rent-A-Books, Inc. P. O. Box 1555, (Print) Grand Central Station, New York, N. Y. 10017, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Signature Date

Street

City State ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

NOW AVAILABLE FOR THE FIRST TIME ANYWHERE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

AMERICA'S FIRST COMPLETE "SEX COURSE" IN ONE VOLUME!

NOW FOR THE FIRST TIME, THE MYSTERY OF SEX IS UNLOCKED THROUGH THE AID OF OVER 150 ACTUAL PHOTOGRAPHS OF A LIVE MAN AND A LIVE WOMAN TOGETHER ENGAGED IN SEXUAL INTERCOURSE POSITIONS!

DOES AMERICA NEED A

PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL?

PENT-R BOOKS INC. P.O. BOX 1555, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear ... "Don't worry, she has time" ... or ... "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the scoop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle pokes. And above all shall we allow our youth to hear every old-wives tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back ... for we have protected morality? We have protected our society from information on sexual intercourse! Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

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P.S. This book cannot now be obtained in any book store or from any other mail order firm. It is presently only available from the publisher, Pent R Books Inc.

With my sincere personal good wishes,

Ronald Oliver

PENT-R BOOKS INC.
P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

APR 26 1969

FIRST CLASS U.S. POSTAGE PAID Permit # 9566

BROOKLYN, N.Y.

FIRST CLASS MAIL

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE C[illegible]

702a

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)

Please check appropriate box!

- Please ship book and place my name on your mailing list.
- I am not ordering at this time but place my name on your mailing list.
- Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

REV H Q GRIFFIS
RT 1 BOX 8
HAMPTON SC 29924

11

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PENT-R BOOKS INC

Gentlemen:

Enclosed please find $ .....

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No. 72 C 586

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 586

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO)

would be a useless order. As shown by the annexed affidavit of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding

of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

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> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

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Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Superintendent of Office Services . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining

addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute --

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neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order. it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives

defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

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In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee, as to the date of

receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

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Nonetheless, at the time the administrative complaint was issued in this case, I followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

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This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

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I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed

is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford a basis upon which any factual findings could be made and an injunction issued, for the certification merely certifies "that the annexed documents constitute true

copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the co plaining addressee. Thus, the only papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory order. Thus, the entire case must fall as being without a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing

does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case. Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General. It was not even issued by a local postmaster. It was issued, on the contrary, by a Superintendent of Office Services. We are not aware of any delegation to such an officer of the power to issue a prohibitory order, and if there was any such delegation of authority, pursuant to any

rule or regulation, we are aware of no statute which would authorize such delegation to the Director of Administrative Services.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of Rev. H.Q. Griffis . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, H. Griffis , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the

right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is

admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well

might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books, 72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis, -- the protestor in this very case --

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

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b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

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> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged

date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being

combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

There is no showing whatsoever, and simply no indication whatsoever, of the date of receipt of the second mailing. Therefore, there is no showing

whatsoever, of the alleged date of the second mailing, by presumption or otherwise, and summary judgment should be granted to the defendant, since Governmental proof of violation is completely lacking.

While the complaining addressee did initial and write a date on the second alleged mailing, the June 4, 1969 Memorandum from the Post Office tells us that he did this "in order that he may identify it in the future if required to do so." It did not even purport to be a date of receipt.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the complaint and order were not even issued by a local Postmaster, but by someone, signing only anonymously by his initials, purporting to act on behalf of the Postmaster, or someone else.

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There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Hampton, S.C. , the address to which the first mailing was made, but out of Columbia, South Carolina . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

AFFIDAVIT OF HERBERT MONTE LEVY

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425479
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

xxxxxxxxxxx 295 Madison Avenue

xxxxxxxxx
689-2220

July 2, 1969

Mr. J. W. Douglas
Postmaster
Columbia, South Carolina 29201

Re: Pent-R Books, Inc. ads P.O.
(Griffis) P.O. Docket No.Co-32769-
1322-203

Dear Postmaster Douglas:

We represent Pent-R Books, Inc., which has received your complaint in the above-entitled matter dated June 17, 1969. We hereby demand a hearing, and further request that this matter be consolidated with the many other Pent-R Books matters pending across the country, and removed to New York for a hearing. In support of this request, we enclose herewith a copy of a letter sent on behalf of another client to a postmaster, dated February 4, 1969, as well as a copy of an answer filed in a pending case involving yet another client; we hereby incorporate by reference all points made in the enclosed and make the same demands, requests, inquiries and objections as are made in such enclosed papers. To aid in the coordination of the numerour Pent-R Books cases pending across the country, which involve the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

Further we move to dismiss the complaint herein for the following reasons:

1. You do not annex a copy of the contents of either mailing, nor do you show the address to which

the second mailing was delivered. Under these circumstances it is impossible for us to tell whether the Prohibitory Order has been violated. Your failure to give us this information is thus not only irregular but further constitutes a denial of Sixth Amendment rights in that my client is not advised of the nature and cause of the accusation, and further denies client due process of law in violation of the Fifth Amendment by failure of it to give adequate notice.

2. The complaint fails to state a cause of action; the matter does not allege the date of the second mailing. Since only a mailing made more than thirty days after the receipt of the Prohibitory Order would violate the Prohibitory Order, it is plain that there has been no allegation of violation of the Prohibitory Order. Accordingly, we move to dismiss the complaint.

3. We further move to dismiss the complaint because the original Prohibitory Order was not issued by the postmaster but by the superintendent of office services. Apparently, too, the complaint was not signed by the postmaster but by the superintendent of office services. Thus, not only the original Prohibitory Order but the Complaint as well are nullities.

Very truly yours,

HERBERT MONTE LEVY

HML:tm

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

LAW OFFICES
OF
HERBERT MONTE LEVY
295 MADISON AVENUE
NEW YORK, N.Y. 10017
(212) 689-2220

August 11, 1969

William Lawrence, Esq.
Assistant General Counsel
Finability Division
Post Office Department
Washington, D.C

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P O. (Drury)
P.O Docket No. R5-P-279

Pent-R Books, Inc. ads. P O (Kasser)
P O Docket No. R5-P-277

Pent-R Books, Inc. ads. P.O. (Griffis)
P O Docket No. Co. 32769-1322-203

Pent-R Books, Inc. ads. P.O. (Holaday)
P.O Docket No. 993 (Detroit)

Pent-R Books, Inc. ads. P O. (Wilcox)
P.O. Docket No. MIN-1034

Pent-R Books, Inc. ads. P.O. (Carson)
P.O. Docket No. R-11, R-51

Pent-R Books, Inc. ads. P.O. (Hagen)
P O. Docket No. R111-NO-28

I am most disquieted by a new practice which has apparently sprung up in regard to the Prohibitory Order cases. In each of the above cases, either a hearing has been denied or an Order has been entered against the mailer, though a demand for a hearing was sent in ample time for the demand to have reached the postmaster within the fifteen day period. In seeking an explanation of this in a phone conference with Mr. Sheehan, Regional Counsel in New York, I was advised

COPY

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

LAW OFFICES
OF
HERBERT MONTE LEVY
292 MADISON AVENUE
NEW YORK, N.Y. 10017
212, 889-2720

August 11, 1969

that the position is now be[illegible]st the date of mailing the demand for hearing is irrelevant, and that the post office is instead considering as determinative the date of receipt by the postmaster concerned.

Of course, you are familiar with the universal legal presumption that mailings mailed one day are delivered the next. Furthermore, Internal Revenue, whenever a filing of it is required by a certain date, always deems the date of mailing (as shown by the postmark) to be the date of filing, and in any event, it is nothing short of ludicrous for the post office itself to be slow in delivering the mails to a postmaster, and then to claim a default because of its own slowness in delivering the mail to its own postmaster.

Neither Mr. Sheehan nor I is clear as to whether, in this situation, an appeal lies to you. If it does, will you kindly consider this letter to be a notice of such an appeal, as well as the brief in support thereof. In any event, I hardly think that the Attorney General would wish to institute a proceeding in court based upon the theory that the post office can be hoist by its own petard. Accordingly, I am sending a copy of this letter to the Attorney General.

One thought more. As you know, I had been sending copies of my demands for hearing to you, as well as to the Postmaster General, in order to assist in coordination and consolidation of numerous cases. More recently, I had been accumulating copies of these to send you and the Postmaster General mailing of a substantial number of copies at a time. I query, firstly, whether it is helpful to you and/or the Postmaster General to have copies sent: If it is not helpful in both cases, or in one of them, I would just as soon avoid the work involved, and would therefore appreciate your advice so that I may take further appropriate action.

Sincerely,

Herbert Monte Levy

HML/mol

COPY

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 586

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PERCAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied

to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the

equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

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Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it

was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

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* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magne ic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape

for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

AFFIDAVIT OF RICHARD S. SCHWARTZ

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing

lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof

would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have

cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

AFFIDAVIT OF RICHARD S. SCHWARTZ

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

AFFIDAVIT OF RICHARD S. SCHWARTZ

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

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* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by

computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy.

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* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials

Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

AFFIDAVIT OF RICHARD S. SCHWARTZ

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate

to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly

demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:
> 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case, all that was annexed to the complaint was a copy of the prohibitory order.

AFFIDAVIT OF RICHARD S. SCHWARTZ

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived defendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 34[illegible]178
Qualified in Kings County
Commission Expires March 30, 19[illegible]75

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Your subscription to POPULAR PHOTOGRAPHY is maintained on one of the world's most modern, efficient computer systems, and if you're like 99% of our subscribers, you'll never have any reason to complain about your subscription service.

We have found that when complaints do arise, the majority of them occur because people have written their names or addresses differently at different times. For example, if your subscription were listed under "William Jones, Cedar Lane, Middletown, Arizona," and you were to renew it as "Bill Jones, Cedar Lane, Middletown, Arizona," our computer would think that two separate subscriptions were involved, and it would start sending you two copies of POPULAR PHOTOGRAPHY each month. Other examples of combinations of names that would confuse the computer would include: John Henry Smith and Henry Smith; and Mrs. Joseph Jones and Mary Jones. Minor differences in addresses can also lead to difficulties. For example, to the computer, 100 Second St. is not the same as 100 2nd St.

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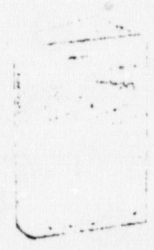

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Orders for $10.00 or more shipped postpaid in U.S.A. & Canada. Add 10% for overseas delivery (except APO/FPO). These manuals are also available from your favorite photo dealer or bookstore.

NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Huf, photographer from Holland; Martin Dubey, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ○

MEMORANDUM AND ORDER BY DOOLING, D. J.

CLOSED

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JUL 29 1974 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 586
(GRIFFIS)

MEMORANDUM
and
ORDER

M' FILMED

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

was ignored. It was mailed to the Postmaster at Columbia, South Carolina, from New York City fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 586
(GRIFFIS)
JUDGMENT

- -X

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC. its agents and assigns (1) refrain from any further mailings to Rev. H. Q. Griffis, Rt. 1, Box 8, Hampton, S.C. 29924

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-name

JUDGMENT

party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 29,1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 587.

DOCKET ENTRIES

72C 587 U.S.A. v. PENT-ROBOOKS, INC.

DATE	FILINGS PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURN
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. Deft srvd 5-25-72.	2
9-27-73	Notice of motion ret 10-15-73 and memorandum in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross-motion for summary judgment filed.	5/
7/29/74	By Dooling,J.-Memo & Order dtd 7/26/74 granting pltff's motion for summary judgment, denying deft's cross-motion for same filed	
7-29-74	JUDGMENT dtd 7-26-74 granting permanent injunction against deft filed.(p/c mailed toattys).	
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff.	

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

COMPLAINT

Civil Action
No.

- X

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about May 4, 1969, defendant mailed or caused to be mailed through the U. S. mail to Richard J. Messer, Lanham, Maryland (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

COMPLAINT

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on May 16, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 2931, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 26, 1969, in violation of Prohibitory Order No. 2931, defendant, or someone acting on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

COMPLAINT

11. On July 15, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 2991, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or about the date it bears.

13. Defendant made a request for a hearing which was denied because it was not timely filed.

14. On September 5, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 2991.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

COMPLAINT

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 2991, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

NOTICE OF MOTION

- against -

72 C 587

PENT-R-BOOKS, INC.,

Defendant.

- X

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at ~~9:15~~ 4:30 o'clock in the ~~forenoon~~ afternoon of that day, or as soon thereafter as counsel may be heard,

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

for an order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 6, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

776a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

October 7, 19 [illegible]

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: [illegible]

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 2991
Issued Against
Pent-R Books Inc.
P.O. Box 1555 Grand Central Station
New York, N.Y. 10017

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. 35-P-277

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

C.G. Beall
Postmaster

Washington, D.C. 20013
City State ZIP Code

[POSTMARK]

WASHINGTON, D.C. SEP 5 1969 USPO

Dated: September 5, 1969

PSD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

In the Matter of Violation of)
)
Prohibitory Order No. 2991)
)
Issued against)
)
PENT-R BOOKS, Inc.) P.O. Docket No. R5 P-277
)
P.O. Box 1555)
Grand Central Station)
New York, N. Y. 10017)
)
and agents or assigns, pursuant to authority)
of Title 39, U.S. Code 4009.)

HEARING DENIAL

Rule 956.3(a) of the Rules of Practice in Proceedings Relative to Violations under 39 U.S. Code 4009 requires that a request for the hearing provided by subsection (d) of 39 U.S. Code 4009 be made in writing and filed with the appropriate postmaster no later than fifteen days from the date of receipt of the violation complaint. As your request for a hearing on the above-captioned matter does not comply with the cited rule, it is denied.

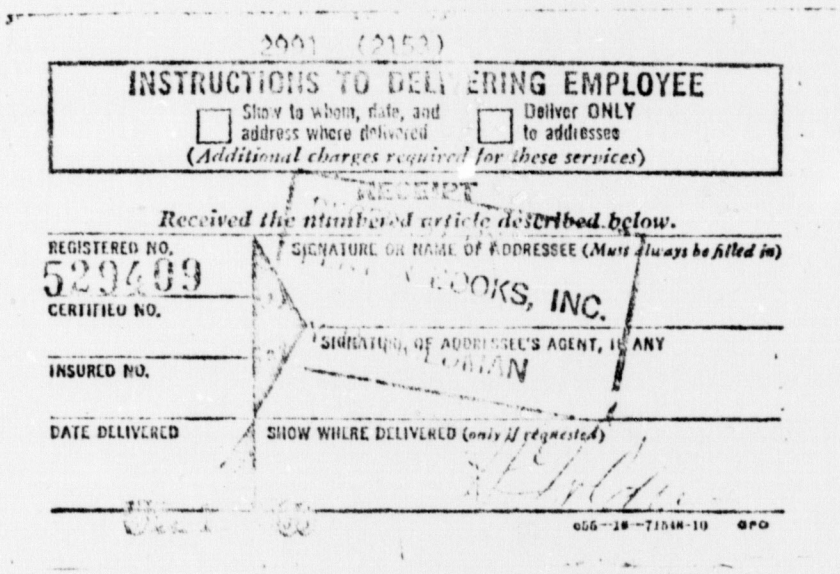
Dated: August 20, 1969

John Q. Sheehan
Regional Counsel
New York Region
Post Office Department
New York, N. Y. 10098

cc: General Counsel

POD Form 2165
Sep. 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



3801 (2152)

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

Received the numbered article described below.

REGISTERED NO. 529409

CERTIFIED NO.

INSURED NO.

DATE DELIVERED

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

BOOKS, INC.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

SHOW WHERE DELIVERED (*only if requested*)

656-16-71818-10 GPO

780a

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k No. ..... Rotary No. ..... Jacket No. .....

L NO. .....

POSTMASTER
Page No. SERVICES CENTER
POSTAL
ROOM 3005
WASHINGTON, D.C. 20015

A.M. Rte. & Flt. No. .....

REGISTERS

Postmark of
Dispatching Office

Postmark of
Dispatching Office

(P.O.—or R.P.O. and Tr. No.)

2991 (2153)

egistration No. or cket or Lock Nos.	OFFICE OF ORIGIN	*Registration No. or Jacket or Lock Nos.	OFFICE OF ORIGIN
529409	Pat R Books Inc	6	
	PO Box 1555	7	
	Grand Central Sta.	8	
	New York NY 10017		

Bill No. .....

A.M. Rte. & Flt. No. .....

Lock No. .....

Rotary No. .....

Jacket No. .....

Received .....

Receiving Clerk

(Use back for reporting irregularities or discrepancies)

tal of ..... articles sent by this dispatch

..... M.
Dispatching Clerk

..... articles ..... M.
ved in this dispatch

Receiving Clerk

Postmark of
Receiving Office

Postmark of
Receiving Office

FORM 3852 *Write "L" before the number if the piece is dispatched loose in pouch and "O" if outside piece, and show destination.

e43—16—23894-11 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 2991
Issued Against

Penn & Becker Inc.

P.O. Box 1555 Grand Central Station

New York, N.Y. 10017

and agents or assigns.

On behalf of:

Mr. Richard J. Hauser
Complaining Addressee

P. O. Docket No. RS P-277

On the 19 day of May, 19 69, you received Prohibitory Order No. 2991, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. [redacted]
3. [redacted]
4. [redacted]

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department [redacted] with the (Address)

undersigned postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK]

WASHINGTON, D. C. JUL 15 1969 USPO

Dated: July 15, 1969

C. G. [redacted]
Postmaster

Washington, D. C. 20013
City State ZIP Code

POD Form 2153
May 1968

782a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U.S. POSTAGE PAID 5¢ Permit No. 9546

Received 6-26-69

Mrs. R. J. Messer.

Richard J. Messer, DDS

FIRST CLASS MAIL

151

RICHARD J MESSER
7308 RIVERDALE AVE
LANHAM MD 34
20801

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE. Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

This is the best done [illegible] its kind I have ever seen. I was concerned about the [illegible] way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

[illegible]

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral Anal Sexuality
Chapter IX ..... Male Oral Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
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Chapter XII ..... Sexual Intercourse During Menstration and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that very few other books offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which

TRY IT ... DON'T BUY IT ... With our money back offer [illegible] deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner, to take advantage of this pioneering book of sexual knowledge. Please act today! A postage-paid reply envelope is enclosed for your convenience. And please remember, you are buying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay. Please order today. Both you and your wife will be glad that you did!

[illegible]

The regular price of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is $12.98. This is the price in many book stores throughout the country and many mail order firms are selling this book for. To the people who were unable to take advantage of our special pre-publication $9.98 offer, we are making this "First Edition Special Offer" for a limited time only. You may purchase "The Photographic Manual Of Sexual Intercourse" with Handsome Kivar Binding for only $9.98 and save $3 for a limited time only. This special offer may not be repeated again! You may have one chance and one chance only to take advantage of this tremendous offer. Please order today! We have books in stock for immediate shipment. Our money back guarantee of course still applies!

[illegible]

- 256 Pages Printed On The Finest Heavy-Weight Pure White Bond And High Gloss Enameled Paper!
- Handsome Kivar Binding (Special Deluxe Binding Also Available)
- Over 150 Actual Photographs In Black & White And Full Color!
- 40 Full Page Photos & 16 Full Page - Full Color Photos!

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER
No Books Will Be Shipped To Unmarried Minors!

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE.
(C.O.D. Orders Accepted But Must Be Accompanied By A $2 Deposit.)

PLANT A BOOKS, INC. P.O. BOX 1855
Grand Central Station, New York, N.Y. 10017

Gentlemen:

Please rush me in plain sealed wrapper _____ copies of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE".

- [ ] Regular Edition: Handsome Kivar Binding $9.98
- [ ] Deluxe Edition: Gold-Stamped Casebound Library Volume $12.98
- [ ] I have enclosed $ _____ [ ] Cash [ ] Check [ ] Money Order
- [ ] I have enclosed $2. Deposit. Please ship C.O.D.

I understand that if I am not completely satisfied, I may return the book within 5 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

_____
signature

Print Name .....

Address .....

City ..... State ..... Zip .....

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, Richard T. Mosser, addressee [parent of
(Print)

minor addressee] of the enclosed mailing from Post-R-Books, Inc
(Print)

Box 61 Brooklyn B.Y. N.Y., consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Richard T. Mosser 6/27/67
Signature Date

725 Riverdale Rd
Street

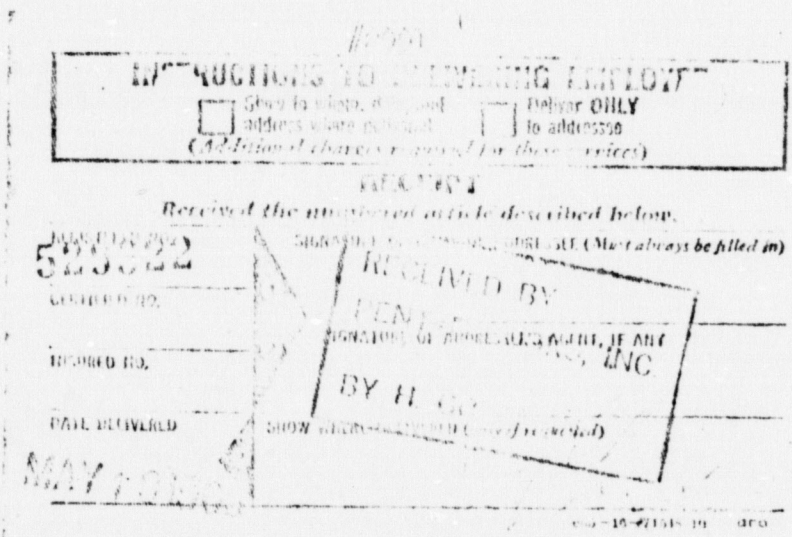
Cheltenham Md 20623
City State ZIP Code

NAMES OF CHILDREN	BIRTH DATE
Sarah L. Miller	6/27/57

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

786a

Lock No. ..... Rotary No. ..... Jacket No. .....

BILL NO. ..... Page No. — A.M. Rte. & Flt. No. .....

REGISTERS

Postmark of

Dispatching Office

Postmark of

Dispatching Office

To POSTMASTER
POSTAL SERVICES CENTER
ROOM 3005
WASHINGTON, D.C. 20013
(P.O. Box, Station or Tr. No.)

2991

Bill No. .....

A.M. Rte. & Flt. No. .....

Lock No. .....

Rotary No. .....

Jacket No. .....

Received .....

Receiving C

Postmark of

Receiving Office

	*Registration No. or Jacket or Lock Nos.	OFFICE OF ORIGIN		*Registration No. or Jacket or Lock Nos.	OFFICE OF ORIGIN
1	529322	Gent-R-Books, Inc.	6		
2		P.O. Box 1555	7		
3		Grand Central Station	8		
4		N.Y., N.Y. 10017	9		
5			10		

1 articles sent by this dispatch

A total of ..... articles received in this dispatch

Dispatching Clerk ..... M.

Receiving Clerk ..... M.

WASHINGTON, D.C.
Postmark of
MAY
10
Receiving Office

☆ GPO

PUD FORM 3852 AUG. 1959

*Write "L" before the number if the piece is dispatched loose in pouch and "O" if outside piece, and show destination.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P[illegible] OFFICE DEPARTMENT

PROHIBITORY ORDER

In the Matter of

Pent-R Books Inc.
Mailer

P.O. Box 1555 Grand Central Station

New York, N.Y. 10017
and agents or assigns

PROHIBITORY ORDER

NO 2991

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Mr. Richard J. Messer 79 at his former address of;
(Name of Addressee)

7308 Riverdale Rd., Lanham, MD 20801
(Address)

and

WHEREAS, said addressee has detetmined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

Mr. Richard J. Messer

Sarah L. Miller

ADDRESS: 6303 Brightlea Dr.
(Street)

Lanham *(City)* Maryland *(State)* 20801 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

WASHINGTON, D. C. MAY 16 1969 USPO

C.G. Beall
Postmaster

[POSTMARK]

Washington, D.C. 20013
City State ZIP Code

Dated: May 16, 1969

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, Richard J. Messer (Print), addressee [parent of minor addressee] of the enclosed mailing from Rent A Books (Print)

PO Box 81 Brooklyn N Y, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

x Richard Messer 5/4/67
Signature Date

6303 Brightlea Dr
Street

Lanham Md 20801
City State ZIP Code

NAMES OF CHILDREN	BIRTH DATE
Sarah L. Miller	6/27/57

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

789a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

FIRST CLASS
PERMIT No. 2[illegible]
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

WASHINGTON, D. C.
MAY
16
1969
USPO

BROOKLYN
N. Y.

FIRST CLASS
POSTAGE
PAID
[illegible]

May 4, 1969
Received
Richard J. Messer
Re: Order #991
Check for $3
Cash

FIRST CLASS MAIL

MR RICHARD J MESSER
7308 RIVERDALE RD
LANHAM MD 20801

79

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED [illegible] offering for sale to Adults Only, a new marriage manual. If you are not pleased with this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED" and initials and return it to your mailman. Upon the return of this envelope we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"This is the [illegible] book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. I.M.F.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you; this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents.

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
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We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment through

TRY IT . . . DON'T BUY IT . . . Without money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money-saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience. And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is refunded without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

..... signature

Print Name. ..... Age. .....

Address .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

NOTICE OF CROSS MOTION.

Docket No. 72 C 587

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 587

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO)

would be a useless order. As shown by the annexed affidavit of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly,

a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

AFFIDAVIT OF HERBERT MONTE LEVY

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

AFFIDAVIT OF HERBERT MONTE LEVY

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out. This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a

pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil

Liberties Union and the Practicing Law Institute --- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives

AFFIDAVIT OF HERBERT MONTE LEVY

defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

AFFIDAVIT OF HERBERT MONTE LEVY

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of

AFFIDAVIT OF HERBERT MONTE LEVY

receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

AFFIDAVIT OF HERBERT MONTE LEVY

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime

AFFIDAVIT OF HERBERT MONTE LEVY

in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand

for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the

Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (525,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford a basis upon which any factual findings could be made and an injunction issued, for the certification merely certifies "that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the complaining addressee. Thus, the only

papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory order. Thus, the entire case must fall as being without a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case.

Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly requires the Postmaster General to issue the order.

The prohibitory order prohibited a mailing to a street address of 6303 Brightlea Dr. However, the second alleged mailing was to a totally different street address, to wit, 7308 Riverdale Ave. Thus, there was clearly no violation of the prohibitory order.

AFFIDAVIT OF HERBERT MONTE LEVY

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on May 19, 1969 and that the second alleged mailing was received by the addressee on June 26, 1969 -- being a difference of less than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption, it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is

admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well

might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr.

Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in

that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this

position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

AFFIDAVIT OF HERBERT MONTE LEVY

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

AFFIDAVIT OF HERBERT MONTE LEVY

The alleged receipt purporting to show the date of receipt, purportedly signed by the complaining addressee, does not clearly show the date it was received. It merely recites "received," or a word or words to such effect. The next line sets forth the name of the addressee. This may well show the date the Post Office received the material from the complaining addressee, rather than the date that the complaining addressee received the second mailing from the defendant. It certainly is not proof that this was the date of receipt by the complaining addressee of the defendant's second alleged mailing.

The writings purporting to indicate receipt by the signatory contain what are apparently two different handwritings, one handwriting showing the alleged date of receipt, and one showing the signature underneath. Since these are in apparently two different handwritings, it is impossible to tell whether or not the date of receipt was perhaps inserted by the Post Office, rather than by the addressee himself. It may be that a trial would disclose this, with an opportunity to examine the complaining addressee, and hence summary judgment should be denied to the Government.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the order was issued by a local Postmaster.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

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Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Lanham, MD. , the address to which the first mailing was made, but out of Washington, D.C. We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
C. G. Beall
Washington, D. C. 20013

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: PENT-R BOOKS, INC.
ads. P.O. (MESSER)
P.O. Docket No. R5 P-277

DATED: August 1, 1969

Client has received the Complaint in the above matter, dated July 15, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutional: both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in PENT-R BOOKS, INC. ads. P.O. (JOX), P.O. Docket No. R5-P-198 We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here are nullities. If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the receipt of the Prohibitory Order, the Complaint fails to state a cause of action; there was no foundation for the issuance of the Complaint in the first place. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The Prohibitory Order prohibited mailings to 6303 Brightlea Drive whereas the alleged second mailing was to 7308 Riverdale Avenue. Thus, the Order was clearly not violated.

4. The Postmaster in Washinton has no jurisdiction over mailings to Maryland.

HERBERT MONTE LEVY

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

LAW OFFICES
OF
HERBERT MONTE LEVY
295 MADISON AVENUE
NEW YORK, N. Y. 10017
(212) 689-2220

August 11, 1969

illiam Lawrence, Esq.
ssistant General Counsel
ilability Division
ost Office Department
ashington, D.C

ear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Emury)
P.O Docket No. R5-P-279

Pent-R Books, Inc. ads. P.O. (Masser)
P.O Docket No. R5-P-277

Pent-R Books, Inc. ads. P.O. (Griffis)
P.O Docket No. Co. 32769-1322-203

Pent-R Books, Inc. ads. P.O. (Jaladay)
P.O Docket No. 993 (Detroit)

Pent-R Books, Inc. ads. P.O. (Wilcox)
P.O. Docket No. MIN-1034

Pent-R Books, Inc. ads. P.O. (Carson)
P.O. Docket No. R-11, M-51

Pent-R Books, Inc. ads. P.O. (Hagen)
P.O. Docket No. RM11-NO-28

I am most disquieted by a new practice which has apparently sprung up in regard to the Prohibitory Order cases. In each of the above cases, either a hearing has been denied or an Order has been entered against the mailer, though a demand for a hearing was sent in ample time for the demand to have reached the postmaster within the fifteen day period. In seeking an explanation of this in a phone conference with Mr. Sheehan, Regional Counsel in New York, I was advised

COPY

that the position is now being taken that the date of mailing the demand for hearing is irrelevant, and that the post office is instead considering as determinative the date of receipt by the postmaster concerned.

Of course, you are familiar with the universal legal presumption that mailings mailed one day are delivered the next. Furthermore, Internal Revenue, whenever a filing of it is required by a certain date, always deems the date of mailing (as shown by the postmark) to be the date of filing, and in any event, it is nothing short of ludicrous for the post office itself to be slow in delivering the mails to a postmaster, and then to claim a default because of its own slowness in delivering the mail to its own postmaster.

Neither Mr. Sheehan nor I is clear as to whether, in this situation, an appeal lies to you. If it does, will you kindly consider this letter to be a notice of such an appeal, as well as the brief in support thereof. In any event, I hardly think that the Attorney General would wish to institute a proceeding in court based upon the theory that the post office can be hoist by its own petard. Accordingly, I am sending a copy of this letter to the Attorney General.

On thought more. As you know, I had been sending copies of my demands for hearing to you, as well as to the Postmaster General, in order to assist in coordination and consolidation of numerous cases. More recently, I had been accumulating copies of these to send you and the Postmaster General mailing of a substantial number of copies at a time. I query, firstly, whether it is helpful to you and/or the Postmaster General to have copies sent: If it is not helpful in both cases, or in one of them, I would just as soon avoid the work involved, and would therefore appreciate your advice so that I may take further appropriate action.

Sincerely,

Herbert Monte Levy

HML/mol

COPY

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

POST OFFICE DEPARTMENT
WASHINGTON REGIONAL OFFICE
521 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20269

IN REPLY REFER TO
102:LEG:fd
31-T-2

August 15, 1969

Mr. Herbert Monte Levy
Attorney at Law
295 Madison Avenue
New York, New York 10017

Re: Pent-K Books, Inc.
ads. P. O. (MESSER)
P. O. Docket #R5-P-277

Dear Mr. Levy:

This is in reply to your letter dated August 1, 1969, concerning, among other things, your request for a hearing for the subject case and a change in venue to New York, New York. Further, you asked for a dismissal of the case based on the following reasons that (1) the underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General; (2) the Complaint fails to allege or show the date of the alleged second mailing; (3) the Prohibitory Order prohibited mailings to 6303 Brightlea Drive whereas the alleged second mailing was to 7308 Riverdale Avenue; and (4) the Postmaster in Washington has no jurisdiction over mailings to Maryland.

In this connection, the complainant has furnished satisfactory evidence that the mailing was forwarded in violation of the subject order. Further, all procedures under the subject law have been followed and met in this regard. Accordingly, we have forwarded the matter to the Regional Counsel in New York to set a hearing and consolidate with other pending matters.

Mr. Sheehan will be in touch with you concerning the time and place for the hearing in accordance with Section 956.4 of the Rules of Practice in Proceedings Relative to Violations Under 39 U. S. Code 4009.

Sincerely yours,

Leo E. Green
Regional Counsel

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

September 2, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Mailability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

" " ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7839-138

" " " ads. P.O. (Messer)
P.O. Docket No. R5-P-277

" " " ads. P.O. (Sellers)
P.O. Docket No. PH-69-4444-69

" " ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

TRU/ART Distributing Corp. ads P.O. (Daum)
P.O. Docket No. BOS-P-69-24

Again, please consider this as a notice of appeal in each of the above matters for the hearing denials therein, and a brief in support thereof, incorporating my prior arguments by reference.

This time, I am particularly appalled by the hearing denial in Kiyak, where the demand for hearing was mailed to Newark 12 days after receipt of the complaint. This means it took at least four days for the letter to arrive -- I can drive to Newark from my office in 25 minutes.

I am also somewhat puzzled by the hearing denial in Messer, dated August 20, 1969, inasmuch as an Order had already been made dated August 1st, which I appealed to you in my letter of August 11, 1969.

Can't we clear up all these items?

Sincerely,

Herbert Monte Levy

HML/mol

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

POST OFFICE DEPARTMENT
WASHINGTON REGIONAL OFFICE
521 TWELFTH STREET, N.W.
WASHINGTON, D.C. 20269

IN REPLY REFER TO
102:LEG:fd
31-T-2

September 3, 1969

Mr. Herbert Monte Levy
Attorney at Law
295 Madison Avenue
New York, New York 10017

Re: Pent-R Books, Inc.
ads. P. O. (MESSER)
P. O. Docket #R5-P-277

Dear Mr. Levy:

This refers to our letter dated August 15, 1969, concerning the subject matter. Enclosed is the Regional Counsel's self-explanatory order dated August 20, 1969, which denies your request for a hearing because it was not timely filed in accordance with the Department's rules in this regard.

The file has been referred to the Assistant General Counsel, Mailability Division, Post Office Department, Washington, D. C. 20260 for further processing under the rules of Administering the Pandering Advertisement Statute (39 U. S. Code 4009).

Sincerely yours,

Leo E. Green
Regional Counsel

Enclosure

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

HEARING DENIAL

Dated: August 26, 19[illegible]

John [illegible]
Regional Comm[illegible]
New York Regio[illegible]
Post Office Depart[illegible]
New York, [illegible]

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

September 16, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Mailability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Messer)
P.O. Docket No. R5 P-277

Tru/Art Distributing Corp. ads. P.O. (Daum)
P.O. Docket No. BosP 69-24

On the date of September 2, 1969, I appealed to you from the hearing denials in both these matters, among others. I have not as yet received a reply.

I now have received Orders in these matters, dated September 5 in the Pent-R matter, and September 4 in the Tru-Art matter. I write to inquire whether, having taken an appeal from the denial of the hearing, there is any need to take an appeal from the Order. If so, please consider this letter as a Notice of Appeal in both matters, and I incorporate by reference reasons previously given in regard to both of these.

Very truly yours,

Herbert Monte Levy

HML/mol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 587

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PRECAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162,

Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which

was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

AFFIDAVIT OF RICHARD S. SCHWARTZ

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer

house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous

steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of

1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

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Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known

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* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the

addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the

rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the

statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use

of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of

mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different

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*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different

people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area

AFFIDAVIT OF RICHARD S. SCHWARTZ

(10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according

to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy.

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* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

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Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

AFFIDAVIT OF RICHARD S. SCHWARTZ

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate

to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated

However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is July 18, 1969, though the date of receipt according to the purported return receipt is July 17, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having been taken without just cause. This raises an issue of fact warranting a trial.

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter,

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type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19..75

EXHIBIT, ANNEXED TO AFFIDAVIT OF RICHARD S. SCHWARTZ. 859a

UNITED STATES POST OFFICE
WASHINGTON, D. C. 20013

OFFICIAL BUSINESS

P-26

PENALTY FOR PRIVATE USE TO AVOID PAYMENT OF POSTAGE, $300

RETURN RECEIPT REQUESTED

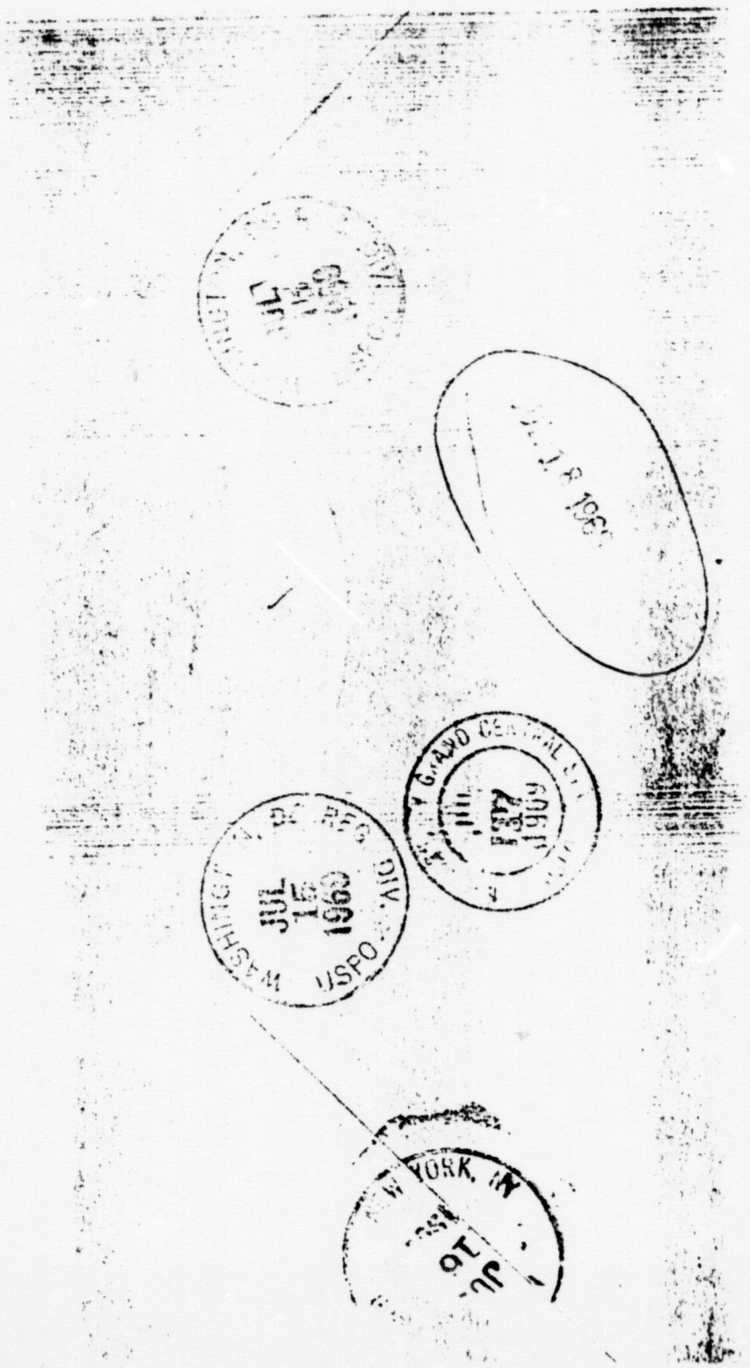
REGISTERED
NO 529409

ADMINISTRATION OF 39 U.S.C. 4009

18

Pent-R Books Inc.
P.O. Box 1555
Grand Central Station
New York, N. Y. 10017

EXHIBIT, ANNEXED TO AFFIDAVIT OF RICHARD S. SCHWARTZ



AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on

which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necessarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman
HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Eileen Stapleton

[illegible] York
[illegible]nty
2, 19[illegible]

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

: 72 C 587
-against- : (MESSER)
:
PENT-R-BOOKS, INC., : MEMORANDUM
: and
Defendant. : ORDER

- - - - - - - - - - - - - - - - - - - -X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, D. J.

was ignored. It was not, however, mailed to the Postmaster at Washington, D.C. from New York City until fifteen days after the receipt of the complaint. In this case, moreover, remand would not be appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above except that the first and second mailings were both to the same address, whereas the Prohibitory Order forbade only mailings to the addressee's new address, advising defendant that the first mailing had been to the addressee's "former address." Since the second mailing was to the same addressee at a former address from which, it could be inferred, his mail would be forwarded, it was a violative mailing. Defendant was on notice of both addresses.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

U. S. D. J.

JUDGMENT.

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D. N.Y.
★ JUL 29 1974 ★
TIME A.M.
P.M.

UNITED STATES DISTRICT COURT

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - -X

72 C 587
(MESSER)
JUDGMENT

M'FILMED

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC. its agents and assigns (1) refrain from any further mailings to MR. RICHARD J. MESSER or SARAH L. MILLER, 6303 Brightlea Dr. Lanham, Maryland, 20801,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its

agents or its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 26, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 588.

DOCKET ENTRIES

72C 588 U.S.A. v PENT-R BOOKS INC.

DATE	FILINGS PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/5/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. Deft srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum insupport of deft's cross motion for summary judgment filed.	5/6
7-25-74	By DOOLING, J. - Memorandum & order dtd. 7-24-74 granting pltff's' motion for summary judgment & denying deft's motion for summary judgment etc. filed. (n/ c to attys)	7
7-25-74	By DOOLING, J. - JUDGMENT dtd 7-24-74 that deft immediately delete above named party(James Metheny) from mailing lists & abstain from sale, rental, exchange or other transaction with Metheny etc. filed	8 JS6
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

COMPLAINT

Civil Action No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about May 26, 1969, defendant mailed or caused to be mailed through the U. S. mail to James Methonie, Parkersburg, West Virginia (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

COMPLAINT

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on May 29, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 917, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about July 14, 1969, in violation of Prohibitory Order No. 917, defendant, or someone acting

on its behalf, mailed or caused to be mailed through the United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On August 6, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 917, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On August 25, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 917.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 917, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

NOTICE OF MOTION

72 C 588

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at 4:30 o'clock in the afternoon of that day, or as soon thereafter as counsel may be heard,

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

for an order pursuant to Rule 56 granting summary judgment to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

October 27, 19[illegible]

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: P.O. Docket No. [illegible]-P-232

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD
SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

in the Matter of Violation of Prohibitory Order No. 917
Issued Against
[redacted]
[redacted]
[redacted]

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. 15-P-292

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

[redacted] Postmaster

[redacted]
City State ZIP Code

[POSTMARK]

Dated:

POD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. 1117,R9

CERTIFIED NO.

INSURED NO.

1. SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

Peat - K

2. SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

D. Kausch

DATE DELIVERED

AUG 8 69

3. WHERE DELIVERED (*only if requested*)

455—16—71548-10 GPO

879a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. [redacted]
Issued Against

[redacted]

[redacted]

[redacted]

and agents or assigns.

On behalf of:

[redacted]
Complaining Addressee

P. O. Docket No. [redacted]

On the [redacted] day of [redacted], 19[redacted], you received Prohibitory Order No. [redacted], copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You [or your agents or assigns have sold, lent, exchanged, or made other transactions involving [redacted] the mailing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify): [redacted]

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department [redacted]
(Address)
with the Undersigned Postmaster
_____, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] CHARLESTON, W. VA. JUN 10 1968

Dated: _____

_____
Postmaster

James G. Lubie,

Charleston, West Virginia 25301
City State ZIP Code

POD Form 2153
May 1968

880a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*FIRST EDITION SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box!

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

138 J T METHENY
BX 3057
PARKERSBURG WV 26103

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Please send me in plain sealed wrapper____ copies of "The Photographic Manual Of Sexual Intercourse" at the First Edition Special price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that if I am not completely satisfied, I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

☐ Regular Edition: Handsome Kivar Binding only $9.98
☐ Deluxe Edition: Gold-Stamped Casebound Librar, Volume only $12.98

☐ I have enclosed $_____ ☐ Cash ☐ Check ☐ Money Order
☐ I have enclosed a $2 Deposit. Please ship C.O.D.

SAVE MONEY! Enclose full payment and save Postage and C.O.D. fees!!

PENT-R BOOKS INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

RECEIVED
DATE July 14, 1969
SIGNED J. T. Methany
MUST BE SIGNATURE OF ADDRESSEE

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit # 9546

Probibitory order 2nd one

FIRST CLASS MAIL

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

881a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"USEFUL POSITIONS OF SEXUAL INTERCOURSE"

A VISUAL AID TO SEX EDUCATION! Now for the first time, for educational purposes only, see a live man and a live woman, a married couple, together on film, demonstrating 30 useful sexual intercourse positions!

AVAILABLE IN TWO PARTS – 8MM AND SUPER 8 BLACK & WHITE OR FULL COLOR

PART 1 *15 USEFUL POSITIONS INCLUDING:*

- Male Dominant – Female Raising One Leg
- Female Locking Legs Around Male For Better Penetration
- Basic Male Recumbent Position
- Female Sitting Upright Straddling Male
- Female Seated Position On Male
- Female "Seated On Peg" Position
- Sitting On Edge Of Bed Position

PART 2 *15 USEFUL POSITIONS INCLUDING:*

- Straddle Position For Greatest Clitoral Contact
- Exotic Relaxed Position
- Female Dominant – Male Sitting Up
- Sitting Face-To-Face
- Saddle Face-To-Face
- Posterior Position
- Male Dominant Posterior Position

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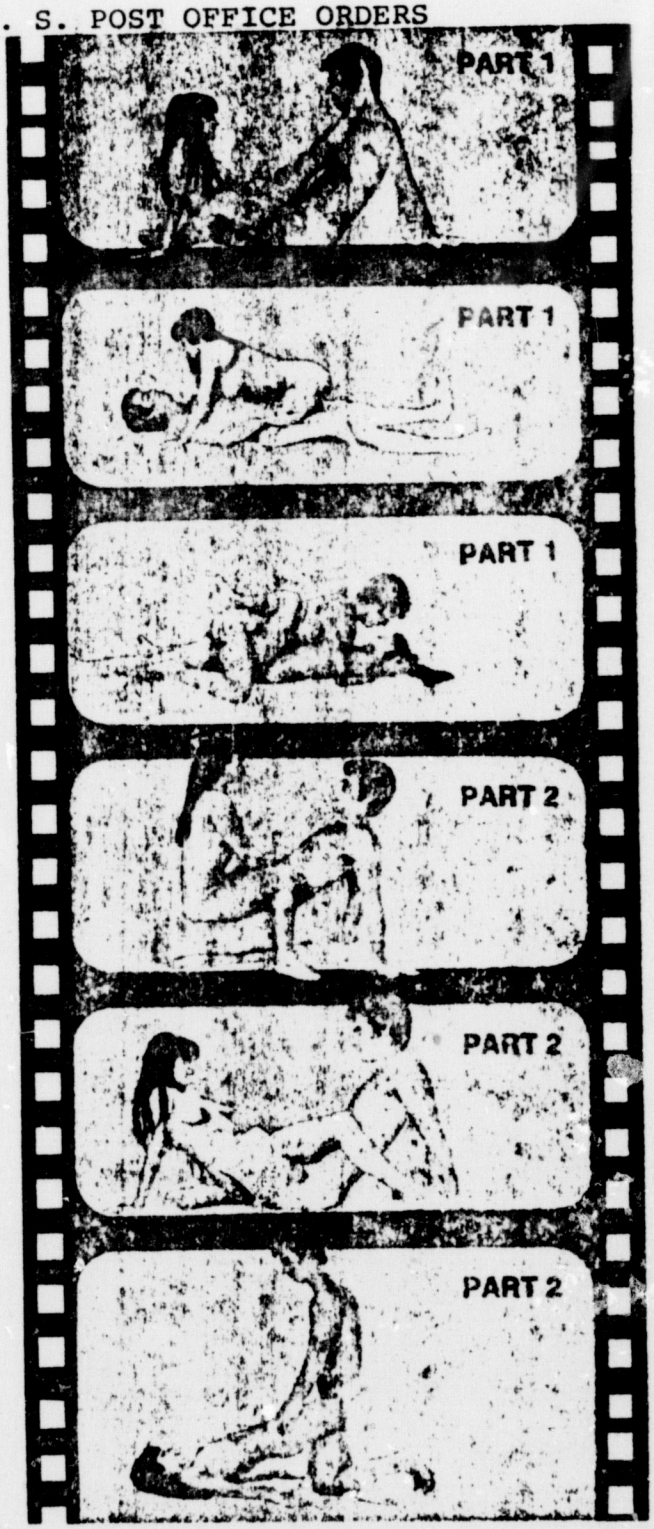
P.O. Box 1555, Grand Central Station, New York, N.Y. 10017



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

USEFUL POSITIONS OF SEXUAL INTERCOURSE

PRICE LIST

	REGULAR 8MM—150 FT. BLACK & WHITE	SUPER 8 175 FT. BLACK & WHITE	REGULAR 8MM—150 FT. FULL COLOR	SUPER 8 165 FT. FULL COLOR
PART ONE	☐ $15.00	☐ $17.00	☐ $30.00	☐ $32.00
PART TWO	☐ $15.00	☐ $17.00	☐ $30.00	☐ $32.00
COMPLETE EDITION	300 FT. ☐ $25.00	340 FT. ☐ $29.00	300 FT. ☐ $50.00	340 FT. ☐ $54.00

AVAILABLE TO MATURE ADULTS OVER THE AGE OF 21 YEARS ONLY!
NO FILM WILL BE SHIPPED TO UNMARRIED MINORS!

NOTICE!

This film was produced to teach married couples how to derive the utmost pleasure, excitement, sensation, ecstasy, satisfaction and happiness from sexual intercourse. It was definitely NOT produced for persons seeking cheap thrills or those seeking to "ogle" at films of persons engaged in sexual intercourse.

SPECIAL 8MM AND SUPER 8 VIEWERS AVAILABLE ..... *ONLY $5.00 EA.*

ORDER FORM

PENT-R BOOKS INC.
Box 1555, Grand Central Station, New York, N.Y. 10017

Gentlemen:

☐ Enclosed please find $_____
☐ Cash ☐ Check ☐ Money Order
☐ Enclosed please find $5 Deposit. Please ship C.O.D.
Please ship the following film:
"UNIQUE POSITIONS OF SEXUAL INTERCOURSE"
☐ 8mm Black & White-Part 1 ☐ Part 2 ☐ Complete Edition
☐ Super 8 Black & White-Part 1 ☐ Part 2 ☐ Complete Edition
☐ 8mm Full Color-Part 1 ☐ Part 2 ☐ Complete Edition
☐ Super 8 Full Color—Part 1 ☐ Part 2 ☐ Complete Edition
☐ 8mm Film Viewer ☐ Super 8 Film Viewer

I hereby represent that I am over the age of 21 years and I have signed to that effect below.

_____
signature

PRINT NAME_____

ADDRESS_____

CITY_____

Save Money! Enclose full payment and save postage and C.O.D. charges!

NOW AVAILABLE ON 8MM FULL COLOR OR BLACK & WHITE FILM

USEFUL POSITIONS OF SEXUAL INTERCOURSE

a visual aid to
SEX EDUCATION
featuring
A MARRIED COUPLE
together engaged in
SEXUAL INTERCOURSE POSITIONS

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

MAJOR BREAKTHROUGH IN SEX EDUCATION!

The Photographic Manual Of

Sexual Intercourse

BY L. R. O'CONNER — INTRODUCTION BY ALBERT ELLIS, PH.D.

NOW FOR THE FIRST TIME, THE MYSTERY OF SEX IS UNLOCKED THROUGH THE AID OF OVER 256 PAGES — OVER 150 ACTUAL PHOTOGRAPHS *(Including 40 Full Page Photos & 16 Full Page Full Color Photographs)* **OF A LIVE MAN AND A LIVE WOMAN TOGETHER ENGAGED IN SEXUAL INTERCOURSE POSITIONS!** *THIS IS TRULY AMERICA'S FIRST COMPLETE "SEX COURSE" IN ONE VOLUME!*

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear ... "Don't worry, she has time" ... or ... "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the stoop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old-wives-tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back ... for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at its highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. *DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL* we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes ... because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indispensable aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book *"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"* without photographs would be a disservice to our readers and would confuse rather than enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We suggest that you order a copy of *"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"*, read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

With my sincere personal good wishes,

Ronald Alvin

Ronald Alvin

Copyright – 1969 Pent-R Books Inc. — P.O. BOX 1555, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

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A BREAKTHROUGH IN SEX EDUCATION!

No dolls, no drawings, no illustrations, no pencil sketches, no partially obscured over-printed photographs, no tracings where one sheet must be placed upon another, no men and women wearing skin tights, no tricks where men and women appear in the photographs separately! Now, for educational purposes only, over 100 coital positions are clearly photographed for instruction purposes in over 150 large clear photographs of a real living nude man and a real living nude woman, a married couple, together engaged in sexual intercourse positions with accompanying descriptive text in the most sophisticated, modern and up-to-date sex manual ever published!

AVAILABLE FOR THE FIRST TIME TO THE ADULT GENERAL PUBLIC!

This brand new just published giant compendium of sex you will find one of the most informative, educational, instructive, eye-opening and mind clearing sexual manuals that you have ever seen or read. It offers the frankest, clearest, most detailed and explicit information through words and actual photographs on *"HOW TO ENGAGE IN SEXUAL INTERCOURSE"* that has probably ever been written! Over 100 coital positions are frankly described in plain language and photographed in over *150 FULL COLOR AND BLACK & WHITE DETAILED PHOTOS!*

THERE HAS NEVER BEEN A BOOK LIKE THIS BEFORE!

Many will call *"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"* America's First Sex Course." Because for you and your wife, that is exactly what it can be. A step by step specific course in words and clear concise photographs of how to engage in the many forms of physical love and sexual intercourse! It can turn dull confused routine "quickie" sex into exciting sexual episodes which continue to improve each time and provide far greater degrees of pleasure and satisfaction than you or your wife ever thought possible!

Here at last, are the techniques which can transform the staleness apathy and boredom of the marital act into a series of invigorating refreshing, fulfilling experiences ...each more thrilling than the last!

The Photographic Manual Of Sexual Intercourse will teach you step by step, in minute detail, each touch, each movement, each kiss, each sensitive area of the body, each technique available to you for giving your mate and yourself new heights of sexual enjoyment and contentment. More, in fact, than you ever thought possible!

NOW! Learn from down to earth solid straight no-punches pulled plain language facts and over 150 clear educational Full Color and Black and White photographs the unusually helpful facts you should know about the many varied aspects of sexual intercourse!

Now for the first time in any book you can see with your own eyes, in large full color and black and white actual photographs the best positions to use for a wide variety of special purposes and sensual effects!

- Discover the positions that narrows the vaginal opening, giving the man more stimulation!
- Learn the position that automatically forces the woman's thighs to add to penile stimulation!
- Discover the positions which most directly excite the clitoris!
- Find out what position holds the male organ after climax, preventing rapid contraction of the organ!
- Learn the position that allows the penis to penetrate to the neck of the uterus while at the same time providing even more sensation from the caressing touch of the scrotum moving upon the woman!
- Learn the position that holds a partial erection most firmly!

This is only a partial list of what the photographs and text will teach you in this amazing new book!

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

Too many married couples are in the dull rut of once-again off-again "quickie" unembellished intercourse with no variations and no experimentations! This book will take you out of the sexual rut and into the sunshine of fresh new youthful exciting sexual activity!

IMAGINE YOURSELF CONSISTENTLY SATISFYING YOUR SEX PARTNER FAR BEYOND HER-OR-YOUR WILDEST EXPECTATIONS! Why not enjoy all the wholesome, healthy thoroughly satisfying sexual delights that are available to you and your sexual partner? It's all so easy and so natural provided you forget the prejudices and fallacies of the bygone eras and recognize the fact that just as there is more to life than eating and sleeping, so there is more to sex than mere "quickie" intercourse! And this is precisely the point this book brings home to you with absolute clarity, detail and the frankest most up-to-date and modern information that is available to the adult general public!

THIS IS NOT A LONG-WINDED BOOK OF DULL THEORY! The "Photographic Manual of Sexual Intercourse" is a clear, live, dynamic, detailed *"HOW TO DO IT"* manual of step-by-step practical instruction. It teaches you, in plain language, direct and to the point, precisely what to do and how and when to do it to increase not only your own pleasure and satisfaction, but the pleasure and satisfaction of the one you love!

This book has one main purpose, to teach you how to derive the utmost pleasure, excitement, sensation, ecstasy and satisfaction from sexual intercourse. It is definitely NOT written for persons seeking cheap thrills or those seeking to "ogle" at pictures of persons engaged in sexual intercourse!

HERE'S WHAT THIS BOOK CAN DO FOR YOU!

1. It can help you develop a healthy life-long attitude toward sex! This healthy attitude can improve your general health, both mental and physical!
2. It can help you learn how to become a successful "lover-husband" and help you to achieve greater success and happiness in every aspect of your business and personal life!
3. It can help you learn how to experience maximum sexual satisfaction from the sex act.
4. It can help you learn how to correct any problem of sexual incompatibility in your marriage! You can learn what causes certain sexual problems and complications and how to avoid and deal with them.
5. It can help you learn the secret of enjoying sex-love happiness in the years ahead. How to keep the fire burning and how to keep your sex life from becoming dull and monotonous!

You can learn numerous ways to prolong the act of intercourse. You can learn how to help your wife to achieve a fuller orgasm. How to arouse her to new found passion and how she can learn to arouse you to a new vitalized sexual relationship. You and your wife can both learn through words and photographs what to do and what NOT to do to become a more accomplished lover and sex partner.

And Now, you can also learn with the aid of text and photographs, how to obtain complete sexual satisfaction even *WHEN INTERCOURSE IS NOT POSSIBLE!* Yes, this is practically a complete guide to a happier sex-love life for married couples! This is the *HOW TO DO IT* book in the marriage and sexual arts! It makes most other text on the subject obsolete!

SEXUAL KNOWLEDGE IS SEXUAL POWER! The vivid detailed photographs in this book show with utmost clarity how to adjust postures for the best possible matching of organs, how to make the sexual side of marriage more vibrant by introducing a variety of caresses and positions into the sexual act. Men and women with sexual knowledge are men and women with power to bring satisfaction and fulfillment to their love partners as well as to themselves. "The Photographic Manual Of Sexual Intercourse" will give you the knowledge and power to master all the wonders and aspects of sex. And remember, it is all available to you *NOW!!* All you have to do is use the enclosed order card!

This book is so fantastic, so modern, informative, educational, so complete, that it will be the last book on sex that you will ever buy because it will be one of the last books on sex that you are likely to need!

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READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, *THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE* is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstruation and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that very few other books offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down-to-earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

OUR GUARANTEE

TRY IT . . . DON'T BUY IT . . . With our money back offer! We have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed to our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book we make the simple, straightforward guarantee to you. Order a copy of *"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE."* Read it. Have your wife read it. If after reading this book, you do not feel powerful in your knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. **Please act today!** A postage paid reply envelope is enclosed for your convenience. And please remember, you are trying, not buying, because if you are dissatisfied for any reason your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

FIRST EDITION SPECIAL OFFER!

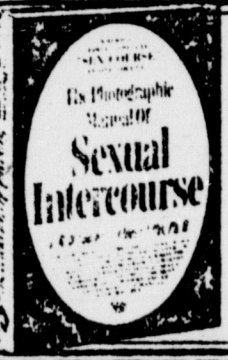
Limited Time Only! ONLY $9.98

The regular price of *"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"* is $12.98. This is the price many book stores throughout the country and many mail order firms are selling this book for. To the people who were unable to take advantage of our special pre-publication $9.98 offer, we are making this "First Edition Special Offer" for a limited time only. You may purchase "The Photographic Manual Of Sexual Intercourse" with Handsome Kivar Binding for only $9.98 and save $3 for a limited time only. This special offer may not be repeated again! You may have one chance and one chance only to take advantage of this tremendous offer. Please order today! We have books in stock for immediate shipment. Our money back guarantee of course still applies!

- 256 Pages Printed On The Finest Heavy Weight Pure White Bond And High Gloss Enameled Paper!
- Handsome Kivar Binding (Special Deluxe Binding Also Available)
- Over 150 Actual Photographs In Black & White And Full Color!
- 40 Full Page Photos & 16 Full Page Full Color Photos!

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER!
No Books Will Be Shipped To Unmarried Minors!

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE
(C.O.D. Orders Accepted But Must Be Accompanied by A $2 Deposit.) *PLEASE CUT ALONG DOTTED LINE*



PENT-R BOOKS, INC., P.O. BOX 1555, Grand Central Station, N.Y., N.Y. 10017

Gentlemen:
Please rush me in plain sealed wrapper ____ copies of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

☐ Regular Edition: Handsome Kivar Binding $2.98
☐ Deluxe Edition: Gold-Stamped Casebound Library Volume $12.98
☐ I have enclosed $ ____ ☐ Cash ☐ Check ☐ Money Order
☐ I have enclosed $2. Deposit. Please ship C.O.D.

I understand that if I am not completely satisfied, I may return the book within 10 days after I receive it for an immediate refund of the purchase price.
I hereby represent that I am over the age of 21 years and I have signed to that effect below:

SIGN ____ Signature

PRINT NAME ____

ADDRESS ____

CITY ____ STATE ____ ZIP ____

SAVE MONEY! Enclose full payment with your order and save postage and C.O.D. charges.

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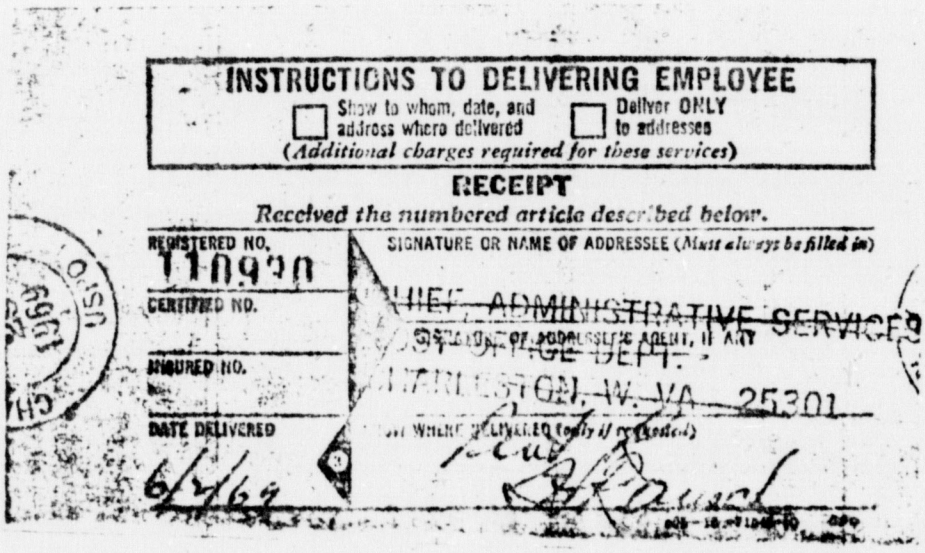

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO. T10930

CERTIFIED NO.

INSURED NO.

DATE DELIVERED 6/2/69

SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)

CHIEF ADMINISTRATIVE SERVICES

POST OFFICE DEPT.

CHARLESTON, W. VA. 25301

ADDRESS OF ADDRESSEE (*Only if requested*)

POSTMARK

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

PROHIBITORY ORDER

In the Matter of

Pent-R-Books, Inc.

Mailer

P. O. Box 81

Brooklyn, N. Y. 11223

and agents or assigns

PROHIBITORY ORDER

NO. 917

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

James Nathonie (Nathony)

(Name of Addressee)

2205 Beverly Street, Box 3057, Parkersburg, WV 26101

(Address)

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter, and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

James Nathonie (Nathony)

ADDRESS: 2205 Beverly Street, Box 3057

(Street)

Parkersburg *(City)* West Virginia *(State)* 26101 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

CHARLESTON, W. VA. MAY 29 1969 USPO

Dated:

James O. Lakin

James O. Lakin, Postmaster

Charleston, W. Va. 25301

City State ZIP Code

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"§ 4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained the age of eighteen years and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

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POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, JAMES MCILHENIE, addressee [~~parent of minor addressee~~] of the enclosed mailing from PENTA-R-BOOKS BOX 81 BROOKLYN, N.Y. 11223, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

(Print)

James T McIlhenie 5/26/69
Signature Date

2203 Beverly St. Box 3057
Street

Parkersburg W Va 26101
City State ZIP Code

NAMES OF CHILDREN	BIRTH DATE

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

892a

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*FIRST EDITION SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box!

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

JAMES METHENIE
BOX 3057
PARKERSBURG WV 26101

121

(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Please send me in plain sealed wrapper____ copies of "The Photographic Manual Of Sexual Intercourse" at the First Edition Special price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that if I am not completely satisfied, I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

☐ Regular Edition: Handsome Kivar Binding only $9.98

☐ Deluxe Edition: Gold-Stamped Casebound Library Volume only $12.98

☐ I have enclosed $_____ ☐ Cash ☐ Check ☐ Money Order

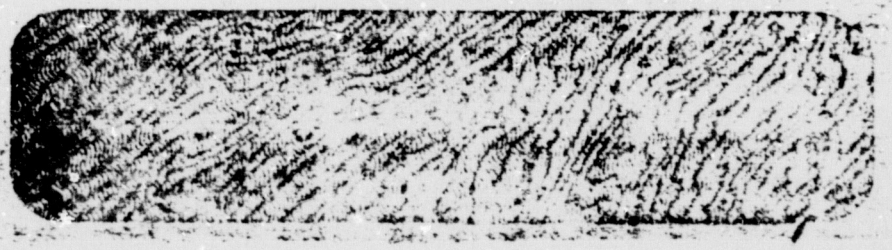
☐ I have enclosed a $2 Deposit. Please ship C.O.D.

SAVE MONEY! Enclose full payment and save Postage and C.O.D. fees!!

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

FIRST CLASS MAIL



This envelope contains
offering for sale to Adults
with this mail or if you are no
THIS ENVELOPE! Simply mark this envelo

893a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

FIRST CLASS
PERMIT No. 28005
BKLYN, N.Y.

BUSINESS REPLY MAIL

NO POSTAGE STAMP NECESSARY IF MAILED IN THE UNITED STATES

POSTAGE WILL BE PAID BY

PENT-R BOOKS INC.

P.O. Box 1555,
Grand Central Station,
New York, N.Y. 10017

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

NOW AVAILABLE FOR THE FIRST TIME ANYWHERE!

Dear Sir,

No one is born with knowledge of how to engage in Sexual Intercourse! How then is one to learn?

The schools, up until at least very recently, have completely and purposely ignored sex education. Ask a school principal or school board official and he will say, "We leave that instruction to parents." Ask a parent if he or she is teaching sex education to their children and you may hear . . . "Don't worry, she has time" . . . or . . . "He'll learn" or "Ask his father, that's his job!" And if the parents fail, where is sexual instruction and knowledge to be obtained? Would you say the school yard or hall, the stoop, the candy store or back alley? Much of our youth has been forced to pick up bits here and pieces there! They are forced to overhear a story of someones' sexual experience. Sneak a look at a few pornographic pictures. Listen to a few lines dropped in a motion picture. Listen to T.V. comedians' subtle jokes. And above all shall we allow our youth to hear every old-wives-tale, every untruth, every misconception, every fallacy. And then, shall we pat ourselves on the back . . . for we have protected morality? We have protected our society from information on sexual intercourse? Naturally, on the day our son or daughter is married, by some miraculous happening, they will leave the wedding ceremony with a complete, accurate broad knowledge of sex. No one stands to take credit for this knowledge. No one seems to know how our newly married couple has obtained sexual knowledge. (In fact, no one knows IF our newly married couple has obtained sexual knowledge.) Let us all hope that our mythical couple has a deck of playing cards with them just in case!

And how about married couples? Perhaps they are not completely satisfied with their sex life. Perhaps sexual unhappiness is disturbing them and could in time break up their marriage. Where should they turn? Sexual unhappiness is something private, something personal, something one person does not quickly reveal to another. In far too many cases, a person remains silent, remains unhappy, and often many innocent bystanders are hurt as a result.

DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL? The divorce rate is fantastic! Premarital pregnancy is at it's highest level. Our mental institutions are doing a thriving business. Adultery seems to be the number one topic in our books and magazines and our movie theatres are showing lesbian and homosexual features to packed houses. DOES AMERICA NEED A PHOTOGRAPHICALLY ILLUSTRATED SEX MANUAL we ask again? We think yes, most definitely yes and we have published one for the adult general public!

ARE THE PHOTOGRAPHS OF A MAN AND WOMAN ENGAGED IN SEXUAL INTERCOURSE REALLY NECESSARY?

We say yes . . . because it has always been and it will always be true that a picture is worth a thousand words!

Ask any educator and he will tell you that photographs, drawings and illustrations are indespensible aids to learning in just about any and all subjects. In fact, many times the text revolves around the pictures. Words or text alone are often unclear to the reader. He or she has to mentally visualize what the words are describing, which unfortunately many of us cannot do well or accurately. Our purpose in preparing this book is not to confuse, not to make points of information hazy or unclear. Our purpose is to get information, ideas and opinions across to the reader, so that the reader may evaluate them and come to his or her own conclusions. We feel that to publish our book "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" without photographs would be a dis-service to our readers and would confuse rather then enlighten them.

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE" is available to you if you are an adult over the age of 21 years. It was not written for beginners or minors, though much of the information it contains would be found useful by an adult who has the responsibility of teaching the young or inexperienced. This book was designed to teach men and women, even with years of sexual experience, what they may have been doing wrong and what they could and should do to give their mate new sexual pleasures, complete sexual satisfaction and to inspire their mate to new love, devotion and happiness.

The following brochure will give you additional details on the contents of the book. We have also enclosed an order form for your convenience.

We sugrest that you order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE", read it, show it to your doctor and if you decide that it does not deserve a permanent place on your bookshelf, simply return it for an immediate refund of your money. It's as simple as that. Our experience has shown us that if we offer a product of value and merit, we won't get many returns. You have absolutely nothing to lose and a great deal of knowledge and happiness to gain.

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A BREAKTHROUGH IN SEX EDUCATION

dolls, no drawings, no illustrations, no pencil ches, no partially obscured over-printed photo- hs, no tracings where one sheet must be placed n another, no men and wo[illegible] wearing skin tights, tricks where men and wo[illegible]n appear in the photo- hs separately! Now, for educational purposes only, r 100 coital positions are clearly photographed for ruction purposes in over 150 large clear photographs l real living nude man and a real living nude woman, arried couple, together engaged in sexual intercourse itions with accompanying descriptive text in the st sophisticated, modern and up-to-date sex manual r published!

AVAILABLE FOR THE FIRST TIME TO THE ADULT GENERAL PUBLIC!

brand new just published giant compendium of sex you will one of the most informative, educational, instructive, opening and mind clearing sexual manuals that you have ever or read. It offers the frankest, clearest, most detailed and icit information through words and actual photographs on W TO ENGAGE IN SEXUAL INTERCOURSE" that has ably ever been written! Over 100 coital positions are frankly ribed in plain language and photographed in over 150 FULL LOR AND BLACK & WHITE DETAILED PHOTOS!

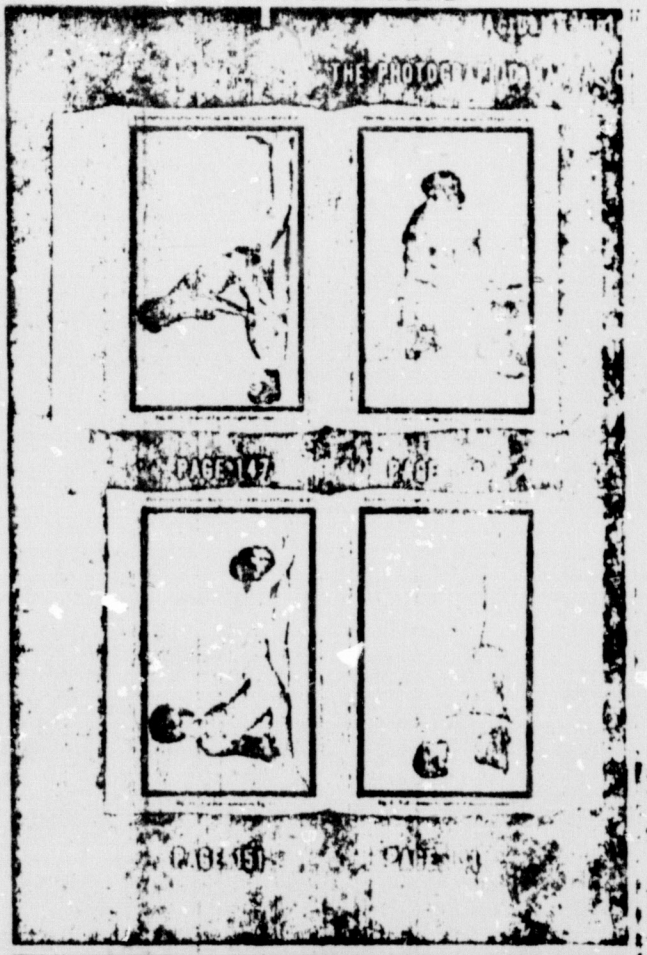
THERE HAS NEVER BEEN A BOOK LIKE THIS BEFORE!

y will call "THE PHOTOGRAPHIC MANUAL OF SEXUAL RCOURSE" America's First Sex Course." Because for you your wife, that is exactly what it can be. A step by step ific course in words and clear concise photographs of how to ape in the many forms of physical love and sexual intercourse! an turn dull confused routine "quickie" sex into exciting ual episodes which continue to improve each time and provide greater degrees of pleasure and satisfaction then you or your ever thought possible!

e at last, are the techniques which can transform the staleness thy and boredom of the marital act into a series of gorating refreshing, fulfilling experiences . . . each more lling than the last!

Photographic Manual Of Sexual Intercourse will teach you by step, in minute detail, each touch, each movement, each each sensitive area of the body, each technique available to for giving your mate and yourself new heights of sexual yment and contentment. More, in fact, than you ever ught possible!

W! Learn from down to earth solid straight no-punches pulled language facts and over 150 clear educational Full Color and k and White photographs the unusually helpful facts you uld know about the many varied aspects of sexual intercourse!



OVER 150 FULL COLOR AND B[illegible] SHOW YOU HOW [illegible] BE A[illegible]

Now for the first time in any book you can see with your own eyes, in large full color and black and white actual photographs the best positions to use for a wide variety of special purposes and sensual effects!

- Discover the positions that narrows the vaginal opening, giving the man more stimulation!
- Learn the position that automatically forces the woman's thighs to add to penile stimulation!
- Discover the positions which most directly excite the clitoris!
- Find out what position [illegible]le organ after climax, preventing rapid contr[illegible]on of the organ!
- Learn the position that allows the penis to penetrate to the neck of the uterus while at the same time providing even more sensation from the caressing touch of the scrotum moving upon the woman!
- Learn the position that holds a partial erection most

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WHITE PHOTOGRAPHS ... MARITAL PARTNER!

so many married couples are in the doldrums of on-again l-again "quickie" unembellished intercourse with no variations d no experimentations! This book will take you out of the xual rut and into the sunshine of fresh new youthful exciting xual activity!

IMAGINE YOURSELF CONSISTENTLY ... YOUR SEX PARTNER ... BEYOND ... OR YOUR WILDEST EXPECTATIONS!

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This book has one main purpose, to teach you how to derive the utmost pleasure, excitement, sensation, ecstasy and satisfaction from sexual intercourse. It is definitely NOT written for persons seeking cheap thrills or those seeking to "ogle" at pictures of persons engaged in sexual intercourse!

WHAT THIS BOOK CAN DO FOR YOU

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pter I ..... History of Sex
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pter XV ..... Compiling Your Own Handbook

enture to suggest that very few other books offer the lete coverage of this single volume. The above table of ts but suggests the scope of what is offered. Each chapter odel of clarity, of down-to-earth language which takes you ctly to the heart of the matter. This book was not written he professional, although we fully expect that many ssionals will insist upon having a copy of this book in a ment position on their bookshelves.

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I hereby represent that I am over the age of 21 years and I have signed to that effect below:

Signature

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No. 72 C 588

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

Herbert Monte Levy

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 588

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court

enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there

is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and

order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was <u>presented</u> that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining

addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute --

neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives

defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

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In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of

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receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint

issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

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This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

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I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed

is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford a basis upon which any factual findings could be made and an injunction issued, for the certification merely

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certifies "that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the complaining addressee. Thus, the only papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory order. Thus, the entire case must fall as being without

a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case. Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

Amongst the papers submitted to the Court is what purports to be a return receipt executed by defendant, for the particular prohibitory order involved in this case. However, there is simply nothing whatsoever to tie in that particular return receipt with the particular prohibitory order. In this connection, it should be noted that this particular defendant has received approximately 200,000 Prohibitory Orders. The Post Office had issued approximately 325,000 Prohibitory Orders by December 31, 1969. Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

It would thus be the easiest thing in the world for the Post Office to have mixed up a particular prohibitory order with a return receipt for another prohibitory order, or with a return receipt for a complaint, or with a receipt for virtually any communication between the Post Office and the defendant, -- or between others -- and to have annexed that to the prohibitory order as the purported receipt for the particular prohibitory order. In the complete absence of any identification whatsoever of the return receipt being a return receipt for the particular prohibitory order, there is simply no proof whatsoever as to either the receipt of the prohibitory order by the defendant or of the date of such receipt. In the absence of proof as to receipt and/or date of receipt, obviously there can be no finding of a violation of that prohibitory order which would have become effective 30 days from the date of its receipt. Since there is no showing of the fact of receipt or the date of receipt, it is thus impossible to show what was the effective date of the order, and therefore impossible to show whether or not there had been a violation by a second mailing, assuming at this moment that a second mailing had been made.

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The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the order was issued by a local Postmaster, who had no authority to issue such an order. If indeed there was any administrative regulation authorizing the delegation to a local postmaster of the power to issue a prohibitory order, then, we submit, there is simply no authority in law for such delegation to have been made, where, as here, the statute expressly requires the Postmaster General to issue the order.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of James Methenie (Metheny) . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, J.T. Metheny , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

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The prohibitory order prohibited a mailing to a street address of 2203 Beverly Street, Box 3057 . However, the second alleged mailing was to a totally different street address, to wit, Bx 3057 . Thus, there was clearly no violation of the prohibitory order.

The prohibitory order prohibited a mailing to an address with zip code 26101. However, the second alleged mailing was to a totally different zip code, to wit, 26103 . Thus, there was clearly no violation of the prohibitory order. This is a particularly significant factor inasmuch as mailers sort out their mailing by zip code, as did the mailer who is defendant here. Having been given an incorrect zip code, it would thus have been completely impossible to even locate by computer, or otherwise, the information necessary to delete the name and address of the addressee. The identical address using two different zip codes would of course be a totally different address; in other words, 120 West 13th Street and a zip code which is a Brooklyn zip code would be a totally different address than 120 West 13th Street in another city or another borough with a different zip code.

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We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of

the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on June 2, 1969 *

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* The return receipt is equivocal and confusing. It bears a postmark containing apparently the same date as the prohibitory order. It also shows a receipt by the Chief of Administrative Services of the Post Office which issued it, apparently crossed out. I would assume that the date of receipt is the date the issuing Charleston Post Office received it, since, as evidenced by the return receipts in companion cases and by Mr. Goldman's accompanying affidavit, it appears to have been the invariable practice of Post Offices here to stamp the alleged receipt date, whereas the receipt date here is handwritten. In any event, there is no proof of date of receipt by defendant.

and that the second alleged mailing was received by the addressee on July 14, 1969 -- being a difference of less than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption, it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved

is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the

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Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in

this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding

this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed

in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

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Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Covernment must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the

Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

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The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

There is nothing whatsoever to tie in the return receipt for the alleged complaint with the particular complaint. Since, by June 30, 1970, according to Vol. III of the Technical Report of The Commission on Obscenity and Pornography, p. 160 the Post Office had issued more than 3,000 complaints, it was extremely easy for the Post Office to have erred administratively, and to have made the error of attaching the wrong return receipt to the complaint. Of course, as Mr. Schwartz admits, he may have made a mistake as well -- we all make mistakes. But there is simply not one scintilla of evidence to show that this particular complaint was ever served upon the defendant. In a department which handled, as well as the complaints referred to some 200,000 orders against defendant and an estimated 750 complaints against it, it would be simply ludicrous to expect

that mistakes have not crept in. But, in any event, in the complete absence of any evidence by affidavit or even by any notation giving the faintest connection between the return receipt and the administrative complaint, there is simply nothing whatsoever here to show that the complaint was ever served, or when it was served.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been

made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Parkersburg, W. Va., , the address to which the first mailing was made, but out of Charleston, W. Va. We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

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For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this

6th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 917
Issued Against
Pent-R-Books, Inc.
P. O. Box 81
Brooklyn, New York 11223

and agents or assigns, pursuant to authority of Title 39, U. S. Code, §4009.

P. O. Docket No. R5-P-292

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

James O. Lakin, Postmaster

Charleston, West Virginia 25301
City State ZIP Code

[POSTMARK]

Dated: AUG 25 1969 USPO CHARLESTON, W. VA.

POD Form
May 1968 2154

EXHIBITS, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

September 8, 1969

William Lawrence, Esq.,
Assistant General Counsel
Mailability Division
Post Office Department
Washington, D.C.

Dear Mr. Lawrence:

Re:	Pent-R Books, Inc.	ads.	P.O.	(Metheny)	No. R5-P-292
	" "	"	P.O.	(Stasiak)	No. R5-P-291
	" "	"	P.O.	(Coffin)	No. NK-69-6370-121
	" "	"	P.O.	(Costa)	No. NK-69-6766-133
	" "	"	P.O.	(Ferguson)	No. PH-69-5342-77
	" "	"	P.O.	(McElravy)	No. BosP 69-35

Again I must appeal to you from the Orders and/or Hearing Denials in the above matters, all of which were received by me last week, asking that you consider this as a notice of appeal, and a brief in support thereof, and incorporating by reference the arguments previously made in my varying letters to you.

I am particularly concerned about the first two matters indicated above, wherein the demand for hearing was mailed eight (8) days after we received the complaint, and, moreover, the Order deciding that the Prohibitory Order had been violated was dated one day prior to the date that the complaint was received.

May we have a prompt ruling on all these matters, and also your advice as to whether I should send copies of demands for hearings to you and/or the Postmaster General in order to expedite matters. My files are, indeed, getting rather clogged with all these matters.

Sincerely,

Herbert Monte Levy

HML/mol

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
James O. Lakin
Charleston, West Virginia 25301

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R Books, Inc.
ads. P.O. (Metheny)
P.O. Docket No. R5-P-292

DATED: September 3, 1969

Client has received the Complaint in the above matter, dated August 6, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in _____ ads. P.O. (_____), P.O. Docket No._____.] We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here (is) (are) (a nullity) (nullities). If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies <u>a fortiorari.</u>

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The Postmaster in Charleston has no jurisdiction over mailings to Parkersburg.

4. Only a copy of the Prohibitory Order was annexed to the complaint. It is therefore impossible to determine whether the Prohibitory Order was violated. The complaint fails to state a cause of action, and client has been deprived of its constitutional rights enumerated in Paragraph 2. above.

HERBERT MONTE LEVY

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

72 C 588

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PRECAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162,

Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by

the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

AFFIDAVIT OF RICHARD S. SCHWARTZ

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer

house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes

which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of

AFFIDAVIT OF RICHARD S. SCHWARTZ

1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defend-

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints, (only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

and (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known

as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the

addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a

20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of

liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

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Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

---

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

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Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the

last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue,

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

AFFIDAVIT OF RICHARD S. SCHWARTZ

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it

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$10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has

become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any

deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is August 26, 1969, though the date of receipt according to the purported return receipt is

AFFIDAVIT OF RICHARD S. SCHWARTZ

August 8, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having been taken without just cause. This raises an issue of fact warranting a trial.

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

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Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows: 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case, all that was annexed to the complaint was a copy of the prohibitory order.

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived

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defendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION.

CHIEF ADMINISTRATIVE SERVICES
POST OFFICE DEPT.
CHARLESTON, W VA 25301
OFFICIAL BUSINESS

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF POSTAGE, $300

RETURN RECEIPT REQUESTED

ADMINISTRATION OF 39 U.S.C. 4009

Pent-R-Books, Inc.
P. O. Box 81
Brooklyn, New York, 11223

REGISTERED
NO. 111289

20 PROHIBITORY ORDER

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION

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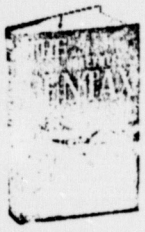

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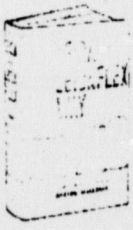

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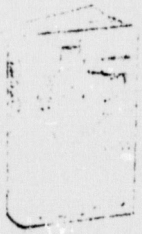

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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Dubey, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Phompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ○

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

AFFIDAVIT

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necessarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman
HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Gideon Sofer

CUSOM [illegible] New York
[illegible] 478
[illegible] County
[illegible] 0, 19 75
Commission Expires [illegible]

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

: 72 C 588
(METHENY)

-against-

: MEMORANDUM
and

PENT-R-BOOKS, INC.,

: ORDER

Defendant.

- - - - - - - - - - - - - - - - - - - X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff.

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

As in 69 C 1362, 72 C 609 and 69 C 1290, the plaintiff has moved for summary judgment on the administrative record and the defendant has cross-moved on affidavits for summary judgment in its favor. The administrative record taken with defendant's affidavits authorizes the following uncontroverted findings of fact:

Some time on or before May 26, 1969, James T. Metheny received from defendant its illustrated brochure advertising its photographic manual of sexual intercourse addressed to "James Methenie, Box 3057 Parkersburg, WV 26101." The addressee then executed a Notice for Prohibitory Order signing his name "James T. Metheny" and giving his street

address as 2203 Beverly Street, Box 3057, Parkersburg, W.Va. 26101. Under date of May 29, 1969, the Post Office issued its Prohibitory Order referring to a mailing piece addressed to "James Methenie (Metheny) 2203 Beverly Street, Box 3057, Parkersburg, WV 26101" and ordered defendant to refrain from any further mailings to the undernamed party at the indicated address "or intended for the indicated address by any variation of addressee designation, such as ... householder, resident, boxholder, postal patron, rural route boxholder, and local"; the name then given is James Methenie (Metheny), the address is given as "2203 Beverly Street, Box 3057" and the rest of the address is given as "Parkersburg, West Virginia 26101."

Defendant made a second mailing of the illustrated brochure addressed to J.T. Metheny, BX 3057, Parkersburg, WV 26103. It was received by J.T. Metheny on July 14, 1969, as set forth on the cover of the envelope. Under date of August 6, 1969, a complaint was issued reciting the Prohibitory Order as one received by defendant on June 2, 1969; it charged that defendant had violated the Prohibitory Order by a further mailing adding, "See Exhibit

attached hereto." Attached, apparently, to the complaint are reproductions of the cover of the envelope, of the enclosed address card (visible through the window of the cover envelope), and the advertising brochure. The administrative file includes a receipt signed by defendant which is stamped, under the space headed "DATE DELIVERED," "Aug. 8, 1969." Defendant has produced ~~XX~~ an envelope stamped with the same registry number that appears on the signed receipt. On the back of the envelope appears the Charleston, West Virginia post office stamp dated August 6, 1969, and two Brooklyn post office stamps, one for the Gravesend Station of August 7, 1969, and the second, somewhat obscured, but also dated August 7, 1969. On the envelope also appears an isolated rubber-stamp date in different colored ink "Aug. 26, 1969."

Under date of August 25, 1969, the post office mailed defendant an Order reciting that satisfactory evidence had been presented that defendant acted in violation of the Prohibitory Order and that the Attorney General was being requested to consider applying to a District Court for an order requiring compliance with the Prohibitory Order. Not, however, until September 3, 1969, did

defendant mail a request for a hearing, through counsel, to the Postmaster. Under date of September 8, 1969, defendant appealed to the Assistant General Counsel, Mailability Division, Post Office Department, on the grounds that defendant had been denied a hearing notwithstanding that it had filed its application for a hearing within eight days after receiving the complaint.

1. The point that defendant makes with most force in connection with the Metheny case is the alleged failure of the post office to effect a timely delivery to defendant of the complaint. Plaintiff contends that the complaint was not received until August 26th and challenges the applicability to the mailing of that complaint of the receipt relied on by the government and incorporated in the administrative record. The only basis for the contention is the Goldman affidavit of November 2, 1973, which, as a reading of it demonstrates, is entirely speculative and wholly insufficient to overcome the self-evidence of the receipt over defendant's own signature and the date on it. This, coupled with the Post Office action in issuing the order of August 25, 1969, is indicative of the belief of

the Post Office that it had a receipt upon which it could properly act and more than overcomes the appearance of the date August 26, 1969, on the reverse of the envelope in which the complaint was delivered. The explanation of this stamped date is barren assertion. The defendant's affidavits show that the possibility of the existence of an individuated recollection by the responsible employees in defendant's service is nil in view of the very large number of mail transactions relating to Post Office Prohibitory Orders and Complaints to which defendant was a party at the time in question. In the end it would be necessary to fall back on the administrative record, including the receipts for the mailings, and the inference to be drawn from these facts plus the presumption of regularity in transactions of an ordered sort in established organizations.

Turning to the Request for Hearing, the grounds assigned for objection to the issuance of a final Order determining violation are insufficient. The loss of the hearing and of the appellate rights are in this case wholly immaterial. The points raised in the Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, D. J.

have all been passed on in the determinations made in this Court in 69 C 1362, 72 C 609 and 69 C 1290. The one factual point made, that only a copy of the Prohibitory Order was annexed to the Complaint, appears to be a plain mistake in the preparation of the request, and is, in any case, immaterial in the absence of a showing of resultant confusion, uncertainty or prejudice (see decision in 72 C 583).

2. It is objected that it was not proper to treat the second mailing as a violation because it was made to James Methenie. The objection is without merit. The Prohibitory Order gave both versions of the name, as noted above, and the second mailing was to the same person, using the second spelling. The mailing reached the same person, and it was not addressed to a name which should or could not have been anticipated as a form of the name which defendant might find in its mailing lists. The evidence of the administrative record is that in fact the second mailing was to the person to whom the defendant was directed to refrain from making further mailings. The objection on the ground of difference in names must be rejected.

3. It is, finally, objected that the second mailing was to a different zip code than the first and that the zip code used in the second mailing was not that contained in the Prohibitory Order. The difficulty with the objection is again that the letter did not miscarry when it was delivered to "J.T.Metheny BX 3057, Parkersburg, WV." The mailing went to the same person, and the correspondence between the two addresses are such as altogether to eliminate the possibility that the person who received the second mailing was not the one to whom the defendant intended to send it.

It is no doubt true that defendant's methods of doing business made it difficult to avoid violation in this respect. Its computerized lists betray it on such occasions. But unfortunately defendant must be treated as though it had only a few short lists and a personal consciousness of all of its acts. Orders are directed to persons not to electronic devices. The complexity of defendant's business is not a defense against the claim of an individual addressee who has obtained an order directing defendant to make no further mailings to him; the statute is addressed

not to facilitating defendant's business or imposing th least costly constraints upon it but to protecting the rights of individuals to be free of what they regard as an unwelcome intrusion.

It is, accordingly

ORDERED that the motion of the plaintiff for summary judgment is granted and the motion of the defendant for summary judgment is denied. A separate compliance order has been approved and will be entered by the Clerk.

Brooklyn, New York
July 24, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
U.S. DISTRICT COURT E.D. N.Y.
JUL 25 1974
TIME A.M.

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 588
(METHENY)
JUDGMENT

M'FILMED

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BOOKS, INC., its agents and assigns (1) refrain from any further mailings to JAMES METHENIE (METHENY), 2203 Beverly Street, Box 3057, Parkersburg, West Virginia 26101, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or

its assigns; and (3) immediately abstain from any sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 24, 1974.

Approved:

U. S. D. J.

Lewis Orgel

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 598.

DOCKET ENTRIES

72C598 U.S.A. v. PENT R BOOKS INC.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/9/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. Deft srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in-support of deft's cross motion for summary judgment filed.	5/6
7/29/74	Judgment directing abstention & deletion of mailings dtd 7/26/74 filed. (P/C mailed to attys)	7
7/29/74	By Dooling, J.-Memo & Order dtd 7/26/74 granting pltff's motion for summary judgment & denying deft's cross-motion for same filed.	
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

COMPLAINT

Civil Action No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about May 6, 1969, defendant mailed or caused to be mailed through the U. S. mail to H. E. Featherston, Lafayette, Louisiana (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on May 14, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 69-1046, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about July 10, 1969, in violation of Prohibitory Order No. 69-1046, defendant, or someone acting on its behalf, mailed or caused to be mailed through the

United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 14, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 69-1046, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or abou the date it bears.

13. Defendant made a request for a hearing which was denied because not timely filed.

14. On January 12, 1970, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 69-1046.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

COMPLAINT

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. , and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff

- against -

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

NOTICE OF MOTION

72 C 598

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at ~~9:25~~ 4:30 o'clock in the ~~seven~~afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment to

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

992a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

January 23 19 7

CERTIFICATION

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: P.O. Docket No. RN-11-N-27 (Featherston, N.C.)

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 628045
Issued Against
[redacted]

[redacted]

[redacted]

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. RH-11-NO-27

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

[redacted]
Postmaster

[redacted] 70115
City State ZIP Code

[POSTMARK] JAN 19 1970 USPO

Dated: [redacted]

POD Form 2154
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

In the Matter of Violation of)
)
Prohibitory Order No. 691046)
)
Issued against)
)
Pent-R-Books, Inc.) P.O. Docket No. RN-11 NO-27
)
P. O. Box 81)
)
Brooklyn, New York 11223)
)
and agents or assigns, pursuant to authority)
of Title 39, U.S. Code 4009.)

HEARING DENIAL

Rule 956.3(a) of the Rules of Practice in Proceedings Relative to Violations under 39 U.S. Code 4009 requires that a request for the hearing provided by subsection (d) of 39 U.S. Code 4009 be made in writing and filed with the appropriate postmaster no later than fifteen days from the date of receipt of the violation complaint. As your request for a hearing on the above-captioned matter does not comply with the cited rule, it is denied.

Dated: August 11, 1969

John Q. Sheehan
Regional Counsel
New York Region
Post Office Department
New York, N. Y. 10099

cc: Office of General Counsel

POD Form 2165
Sep. 1968

GPO 864-786

995a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

UNITED STATES OF AMERICA
POST OFFICE DEPARTMENT

Dallas, Tx 75221

In the Matter of Violation of)

Prohibitory Order No. **691046**)

Issued Against)

Pent-R-Books, Inc.)

P. O. Box 81)

Brooklyn, New York 11223)

P.O.D. Docket No. **RN-11 NO-27**

_____)

AND AGENTS OR ASSIGNS,)

pursuant to authority of)
Title 39, U. S. Code, §4009.

File being transferred to New York Regional Counsel, Post Office Department for further handling.

ACKNOWLEDGEMENT OF REQUEST FOR HEARING

Your request for hearing on the above-captioned matter, made pursuant to 39 U. S. Code 4009 and Rule 956.3 of the Rules of Practice in Proceedings Relative to Violations under 39 U.S. Code 4009, has been received and is hereby acknowledged. You will be notified in due course as to the time and place of hearing, and as to any other preliminary matters raised in your request for hearing or otherwise appropriate for determination prior to hearing.

REGIONAL COUNSEL

Dallas REGIONAL OFFICE

POST OFFICE DEPARTMENT

Dallas, Texas 75221

POD Form 2180
Sept. 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

DEMAND FOR HEARING, ETC.

TO: Postmaster
Paul V. Burke
New Orleans, La. 70113

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: PENT-R BOOKS, INC.
ads. P.O. (Featherston)
P.O. Docket No. RN11-NO-27

DATED: August 1, 1969

Client has received the Complaint in the above matter, dated July 14, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionalit both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

furnished to you in PENT-R BOOKS, INC. ads.
P.O. (HAGEN), P.O. Docket No. RN11-N-O-28.]
We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Post-

master General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here are nullities. If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the receipt of the Prohibitory Order, the Complaint fails to state a cause of action; there was no foundation for the issuance of the Complaint in the first place. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. No copies of either mailings were annexed to the envelope except for the mailing envelope in the second mailing.

4. The Prohibitory Order did not prohibit the mailing to any named individual: It prohibited mailing to Box 3647 Halliburton but the second mailing was to that same box number to Lafayette. Therefore, the Order was clearly not violated.

5. The Postmaster at New Orleans does not have jurisdiction over mailings to Halliburton or Lafayette.

Herbert Monte Levy

HERBERT MONTE LEVY

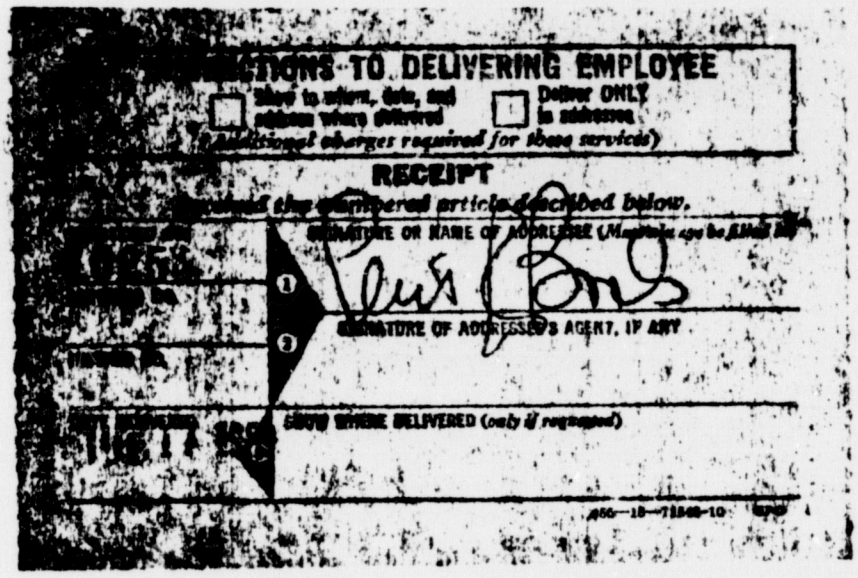
HERBERT MONTE LEVY
295 Madison Avenue
NEW YORK, N. Y. 10017

6c

Postmaster
Paul V. Burke
New Orleans, La. 70113

999a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



...TIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

...ceived the registered article described below.

SIGNATURE OR NAME OF ADDRESSEE (Must be filled in)

1

2 SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE WHERE DELIVERED (only if requested)

...50—18—71548-10

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 691046
Issued Against

Post-R Books, Inc.

P.O. Box 81

Brooklyn, New York 11223

and agents or assigns.

On behalf of:

Mr. E. E. Featherston
Complaining Addressee

P. O. Docket No. NN11-NO-27

On the 19 day of May, 1969, you received Prohibitory Order No. 691046, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, _____ (Address)
with the undersigned Postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

JUL 14 1969

[POSTMARK]

Paul V. Burke
Paul V. Burke
Postmaster

Dated: July 14, 1969

New Orleans, Louisiana 70113
City State ZIP Code

POD Form 2153
May 1968

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

*FIRST EDITION SPECIAL OFFER - $9.98 (Limited Time Only)

Please check appropriate box!

☐ Please ship book and place my name on your mailing list.
☐ I am not ordering at this time but place my name on your mailing list.
☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

138

H FEATHERSTON
BOX 3647
LAFAYETTE LA 70501

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

Gentlemen:

Please send me in plain sealed wrapper ____ co
of "The Photographic Manual Of Sexual In
course" at the First Edition Special price of
$9.98 per copy. I am over the age of 21 years a
have signed the statement on the left to that eff
I understand that if I am not completely satisfi
may return the book within 10 days after I re
it for an immediate refund of the purchase p

☐ Regular Edition: Handsome Kivar Binding o
$9.98

☐ Deluxe Edition: Gold-Stamped Casebound
Library Volume only $12.98

☐ I have enclosed $ ____ ☐ Cash ☐ Che
☐ Money Order

☐ I have enclosed a $2 Deposit. Please ship C.

SAVE MONEY! Enclose full payment and sav
Postage and C.O.D. fees!!

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

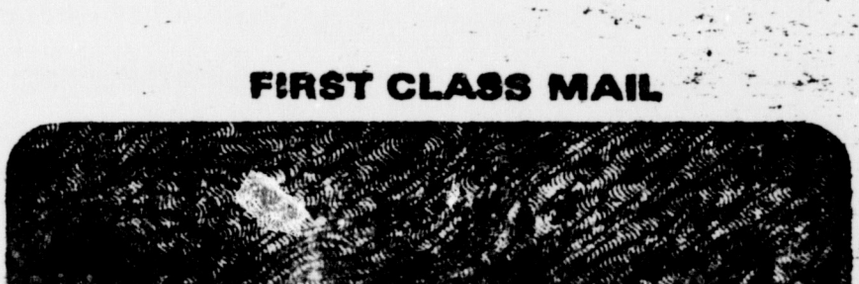
BROOKLYN N. Y.

FIRST C
U. S. PO
PA
6c
Permit

Received
10 July 1969

Henry E. Featherston

FIRST CLASS MAIL

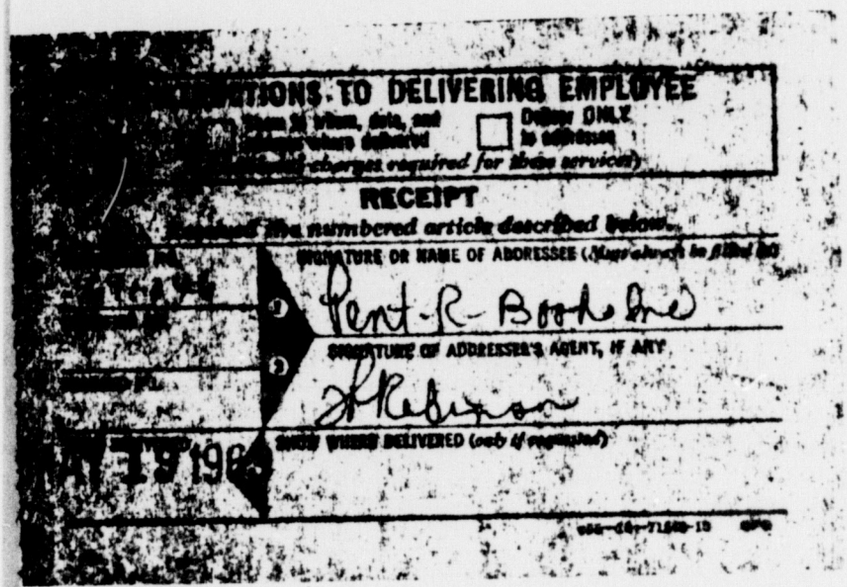


PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTR
offering for sale to Adults Only, a new marriage m
wish this mail or if you are not over the age of 21 y
THIS ENVELOPE! Simply mark this envelope "RE
below and return it to your mailman. Upon the receip
will endeavor to remove your name from our mailing l

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

Pent-R Books, Inc.
Mailer

P.O. Box 81

Brooklyn, New York 11223
and agents or assigns

PROHIBITORY ORDER

NO. 691046

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Mr. H. E. Featherston, Halliburton
(Name of Addressee)

Box 3647, Lafayette, La. 70501
(Address);

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

ADDRESS: 404 Cambridge Circle, Or Box 3647 Halliburton
(Street)

Lafayette *(City)* Louisiana *(State)* 70501 *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

[POSTMARK]

MAY 14 1969

Dated: May 14, 1969

Paul V. Burke

Paul V. Burke
Postmaster

New Orleans, La. 70113
City State ZIP Code

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

USE THIS FORM

I, Henry Featherston, recipient of the enclosed mailing from Pent-R Books, Inc. P.O. Box 81, Brooklyn, N. Y. 11223

(Print or type your name) (Print name, address, city, state, ZIP Code)

consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, § 4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me, [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

Henry E. Featherston, 6 May 1969

Your Signature Date

404 Cambridge Circle or Box 3647 Halliburton

Street

Lafayette, Louisiana, 70501

City, State, ZIP Code

LIST CHILDREN AND BIRTHDATES:

None

TRY IT! DON'T BUY IT! WITH OUR SPECIAL MONEY BACK GUARANTEE!

"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE"

***SPECIAL PRE-PUBLICATION PRICE – ONLY $9.98 (Limited Time Only)**

Please check appropriate box!

- ☐ Please ship book and place my name on your mailing list.
- ☐ I am not ordering at this time but place my name on your mailing list.
- ☐ Remove my name from your mailing list.

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

I hereby represent that I am over the age of 21 years.

signature .....

Mr. H. E. Featherston
95 Halliburton
Box 2647
Lafayette, La. 70501

*(You must be over the age of 21 years and sign statement to that effect above, to order. No books will be shipped to unmarried minors.)

Please check the spelling of your name and address as it appears above. If any errors exist, please make the necessary corrections with a pen.

PENT-R BOOKS, INC.
P.O. Box 1555
Grand Central Station
New York, N.Y. 10017

PENT-R BOOKS INC.

Gentlemen:

Enclosed please find $ .....

[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of only $9.98 per copy. I am over the age of 21 years and I have signed the statement on the left to that effect. I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1006a

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit # 9546

Request for prohibitory order

3647

FIRST CLASS MAIL

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 598

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 598

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a

contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application,

> and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out. This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Postmaster . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the

AFFIDAVIT OF HERBERT MONTE LEVY

Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

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As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

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The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously

the Post Office could not have put a stamp on the back of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office

had adopted a new construction of the statute, that they had now decided that they were going to take the words of the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this

official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford a basis upon which any factual findings could be made and an injunction issued, for the certification merely certifies "that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the complaining addressee. Thus, the only papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has

the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory order. Thus, the entire case must fall as being without a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case. Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

The Pandering Law, as it existed at the time of the alleged violation complained of here,

did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General, nor even by a local postmaster, nor even by an identifiable individual. On the contrary, it was signed by some anonymous individual, signing by initials only, or, if a name was given, where his status was completely undisclosed, even to this time. We know of no statutory or other authority pursuant to which a delegation was made to any such anonymous or virtually anonymous person; if there exists any such delegation, by regulation or toherwise, we are completely unaware of any statutory authority for such delegation. Therefore, the original prohibitory was a complete nullity, and the entire proceeding must fall as being without a foundation, the Government's motion for summary judgment should be denied, and summary judgment should be granted to the defendant.

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The prohibitory order completely failed to identify any person or persons to whom a second mailing should not be made. It was thus nothing but a completely nullity, since it did not prohibit a mailing to any specified person. It was totally unauthorized by the Pandering Law, and therefore, the Government's motion for summary judgment should be denied, the complaint dismissed, and plaintiff's cross-motion for an order requiring the striking of the prohibitory order should be granted.

The prohibitory order prohibited a mailing to a street address of 404 Cambridge Circle, or Box 3467 Halliburton. However, the second alleged mailing was to a totally different street address, to wit, Box 3647 . Thus, there was clearly no violation of the prohibitory order.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged,

and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, it is quite clear that the presumption does not operate, since, according the Government the benefit of every doubt and assuming for purposes of this argument solely that the evidence is admissible, the most that the Government alleged file shows is that the prohibitory order was received by defendant on May 19, 1969 and that the second alleged mailing was received by the addressee on July 10, 1969 -- being a difference of less

than 60 days between such two dates. Thus, the presumption cannot operate, and in the absence of any proof whatsoever other than that to be gained by the use of the presumption, it is quite clear that the Government has not made out a violation of the prohibitory order, and that summary judgment should be granted to the defendant, dismissing the complaint.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

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The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so

as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

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That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The

Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross

examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one

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Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The writings purporting to indicate receipt by the signatory contain what are apparently two different handwritings, one handwriting showing the alleged date of receipt, and one showing the signature underneath. Since these are in apparently two different handwritings, it is impossible to tell whether or not the date of receipt was perhaps inserted by the Post Office, rather than by the addressee himself. It may be that a trial would disclose this, with an opportunity to examine the complaining addressee, and hence summary judgment should be denied to the Government.

The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

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There is nothing whatsoever to tie in the return receipt for the alleged complaint with the particular complaint. Since, by June 30, 1970, according to Vol. III of the Technical Report of The Commission on Obscenity and Pornography, p. 160 the Post Office had issued more than 3,000 complaints, it was extremely easy for the Post Office to have erred administratively, and to have made the error of attaching the wrong return receipt to the complaint. Of course, as Mr. Schwartz admits, he may have made a mistake as well -- we all make mistakes. But there is simply not one scintilla of evidence to show that this particular complaint was ever served upon the defendant. In a department which handled, as well as the complaints referred to some 200,000 orders against defendant and an estimated 750 complaints against it, it would be simply ludicrous to expect that mistakes have not crept in. But, in any event, in the complete absence of any evidence by affidavit or even by any notation giving the faintest connection between the return receipt and the administrative complaint, there is simply nothing whatsoever here to show that the complaint was ever served, or when it was served.

Additionally, I note that there is no signature whatsoever of the defendant's agent.

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While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, the complaint was not even issued by a local Postmaster, but by someone, signing only anonymously by his initials, purporting to act on behalf of the Postmaster, or someone else.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

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Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Lafayette, La. , the address to which the first mailing was made, but out of New Orleans, La. We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases, which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this
6th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 1975

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Paul V. Burke
New Orleans, La. 70113

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 1001

RE: PENT-R BOOKS, INC.
ads. P.O. (Featherston)
P.O. Docket No. RN11-NO-27

DATED: August 1, 1969

Client has received the Complaint in the above matter, dated July 14, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutional both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in PENT-R BOOKS, INC. ads. P.O. (HAGEN), P.O. Docket No. RN11-N-O-28 We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here are nullities. If either the Order

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the receipt of the Prohibitory Order, the Complaint fails to state a cause of action; there was no foundation for the issuance of the Complaint in the first place. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. No copies of either mailings were annexed to the envelope except for the mailing envelope in the second mailing.

4. The Prohibitory Order did not prohibit the mailing to any named individual. It prohibited mailing to Box 3647 Halliburton but the second mailing was to that same box number to Lafayette. Therefore, the Order was clearly not violated.

5. The Postmaster at New Orleans does not have jurisdiction over mailings to Halliburton or Lafayette.

Herbert Monte Levy

HERBERT MONTE LEVY

1041a

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

August 12, 1969

William Lawrence, Esq.
Assistant General Counsel
Mailability Division
Post Office Department
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Mark)
P.O. Docket No. 1157

Pent-R Books, Inc. ads. P.O. (Featherston)
P.O. Docket No. RN-11 NO-27

Please refer to my letter of August 11th to you. Today I have received two more hearing denials, both in connection with the above cases. They are particularly aggravating, inasmuch as in the Mark matter, the complaint was received by client on July 14th and the demand for hearing mailed on July 25th -- only 11 days later --, while in Featherston the complaint was received on July 18th, and the demand for hearing sent on August 1st.

I request, and I am sure you will grant, leave to have my arguments of yesterday's letter incorporated by reference herein, treated as a brief, and this letter treated as a notice of appeal.

I am also sending a copy of this letter to the Attorney General.

Sincerely,

Herbert Monte Levy

HML mol

cc: Hon. John Mitchell

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #

72 C 598

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PRECAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining the Prohibitory Order and following through for a complaint.

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for"The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in publishing, selling and distributing materials protected

by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months --

which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus,

although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance.

Thus, we note the following: All mailings for defendant were handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there

are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received

from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant

found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which

now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant,

who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such

other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue, New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 30,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

sealed mailing envelope. Pent-R Books, et al v. U S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized

method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is July 18,1969, though the date of receipt according to the purported return receipt is July 17, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it

bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having been taken without just cause. This raises an issue of fact warranting a trial.

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

AFFIDAVIT OF RICHARD S. SCHWARTZ

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 34[illegible]78
Qualified in Kings County
Commission Expires March 30, 19 75

1069a

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION.

DIR. ADMINISTRATIVE SERVICES
UNITED STATES POST OFFICE
NEW ORLEANS, LOUISIANA 70113

OFFICIAL BUSINESS

P-192

PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF POSTAGE, $300

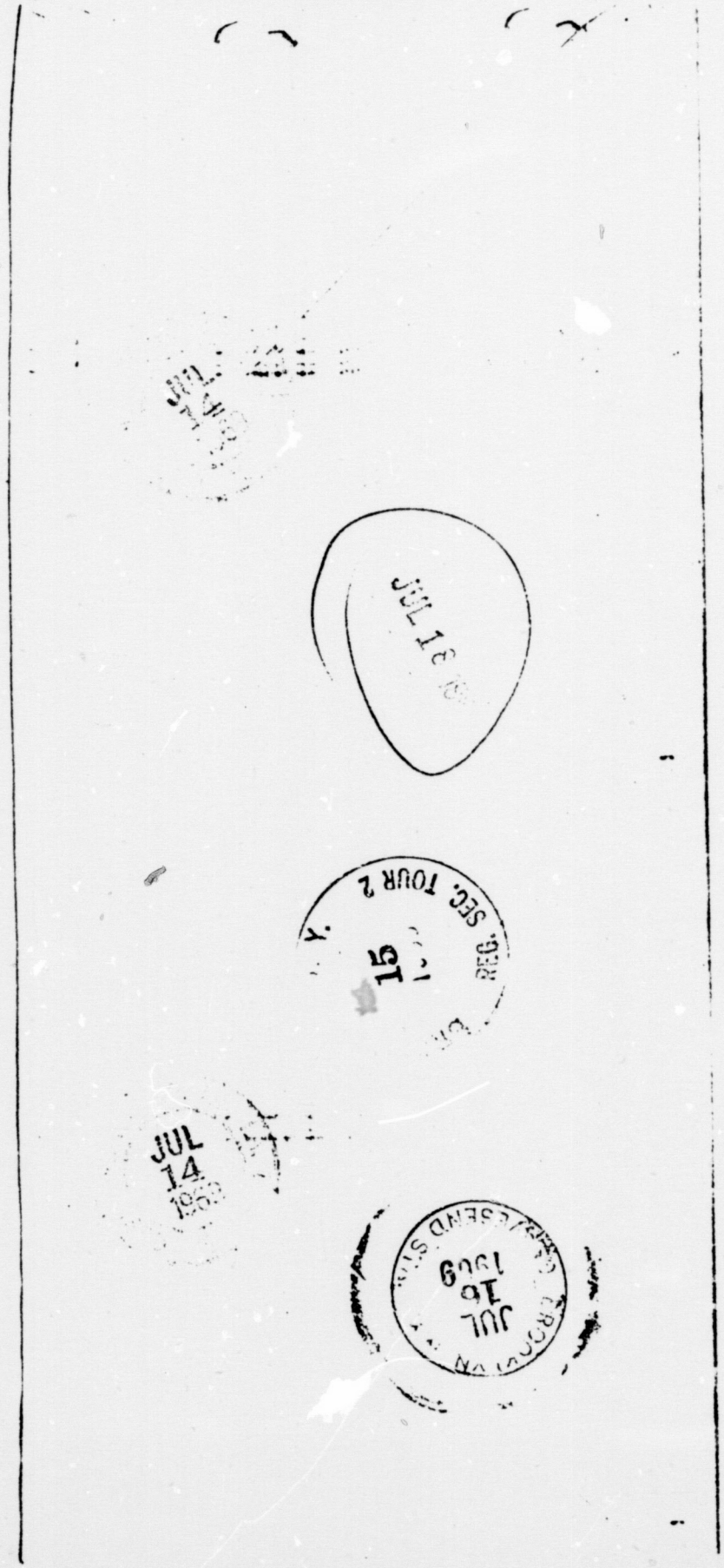
REGISTERED
RETURN RECEIPT REQUESTED

REGISTERED
NO. 10254

Pent-R Books, Inc.
Post Office Box 81
Brooklyn, New York 11223

ADMINISTRATION OF 39 U.S.C. 4009

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION



ABOUT YOUR SUBSCRIPTION

Your subscription to POPULAR PHOTOGRAPHY is maintained on one of the world's most modern, efficient computer systems, and if you're like 99% of our subscribers, you'll never have any reason to complain about your subscription service.

We have found that when complaints do arise, the majority of them occur because people have written their names or addresses differently at different times. For example, if your subscription were listed under "William Jones, Cedar Lane, Middletown, Arizona," and you were to renew it as "Bill Jones, Cedar Lane, Middletown, Arizona," our computer would think that two separate subscriptions were involved, and it would start sending you two copies of POPULAR PHOTOGRAPHY each month. Other examples of combinations of names that would confuse the computer would include: John Henry Smith and Henry Smith; and Mrs. Joseph Jones and Mary Jones. Minor differences in addresses can also lead to difficulties. For example, to the computer, 100 Second St. is not the same as 100 2nd St.

So, please, when you write us about your subscription, be sure to enclose the mailing label from the cover of the magazine—or else copy your name and address exactly as they appear on the mailing label. This will greatly reduce any chance of error, and we will be able to service your request much more quickly.

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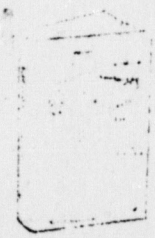

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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths:*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image.*

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland.*

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ○

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

AFFIDAVIT

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necessarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman
HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Gilsom Safdeye

GILSOM SAFDEYE
Notary Public, State of New York
No. 34
Qualified in
Commission Expires [illegible] 19 75

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

: 72 C 598
(FEATHERSTON)

: MEMORANDUM
and
ORDER

- - - - - - - - - - - - - - - - - - - -X

Appearances:

LLOYD H. BAKER, Esq. (James D. Tierney, United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, , and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, D. J.

was ignored. It was mailed to the Postmaster at New Orleans, Louisiana from New York City until fifteen days after the receipt of the complaint. In this case, moreover, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not resolved against the defendant in the dockets referred to above.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 26, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

- -X

CLOSED

FILED 72 C 598
IN CLERK'S OFFICE (H.E. FEATHERSTON)
U. S. DISTRICT COURT E.D.N.Y.
JUDGMENT

★ JUL 29 1974 ★

TIME A.M.

MICROFILMED

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC., its agents and assigns (1) refrain from any further mailings to H.E.FEATHERSTON, 404 Cambridge Circle or Box 3647 Halliburton, Lafayette, Louisiana 70501,

or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from any

JUDGMENT

sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 26, 1974.

Approved:

U. S. D. J.

Louis Angel
CLERK

by Thomas B Costello
chief Deputy Clerk

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 599.

DOCKET ENTRIES

72C 599 U.S.A. v. PENT BOOKS INC.

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
5/9/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned a[illegible] filed. Deft srvd 5-25-72.	2
9-27-73	Pltff's notice of motion ret 10-15-73 and emmo in supportof motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	
[illegible]-74	By DOOLING, J. - Memorandum & order dtd. 7-29-74 granting pltff motion for summary judgment & denying deft's cross-motion etc. filed.	
7-30-74	JUDGMENT dtd. 7-29-74 ordering deft from refraining from furt[illegible] mailings to William Costa etc. filed. Copies to attys	
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

TENT-R BOOKS, INC.,

Defendant.

- X

COMPLAINT

Civil Action No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about April 7, 1969, defendant mailed or caused to be mailed through the U. S. mail to Bill Costa, Allendale, New Jersey (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

COMPLAINT

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on April 15, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 6766, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about June 30, 1969, in violation of Prohibitory Order No. 6766, defendant, or someone acting on its behalf, mailed or caused to be mailed through the

United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 2, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 6766, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or about the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On November 19, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 6766.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 6766, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

NOTICE OF MOTION

72 C 599

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 15th day of October, 1973, at ~~9:45~~ 4:30 o'clock in the ~~fore~~after noon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States
of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

1086a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

January 23, 19 71

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit:

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD
SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

1087a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of
Prohibitory Order No. 6766
Issued Against
[redacted]

P.O. BOX 1555

[redacted]

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. [redacted]

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

J. Kelly
Postmaster [redacted]
FOR JOSEPH A. BENUCCI
NEWARK NEW JERSEY 07102
City State ZIP Code

[POSTMARK] NEWARK, N.J. NOV 19 1969 USPO

Dated:

POD Form
May 1968 2154

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

6766 133

INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.	SIGNATURE OR NAME OF ADDRESSEE (*Must always be filled in*)
CERTIFIED NO.	SIGNATURE OF ADDRESSEE'S AGENT, IF ANY
INSURED NO.	
DATE DELIVERED	SHOW WHERE DELIVERED (*Only if required*)

C55-16-71519-10 GPO

1089a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 6766
Issued Against

[redacted]

BOX 1555

[redacted]

and agents or assigns.

On behalf of:

[redacted]
Complaining Addressee

P. O. Docket No. NY-69-6766-133

On the 26th day of April, 19 69, you received Prohibitory Order No. 6766, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [redacted] (Address)

[redacted], within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] JUL 2 1969 USPO

Dated: [redacted]

J Keeler

Postmaster [redacted]

[redacted]

City State ZIP Code

POD Form 2153
May 1968

1090a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

PENT-R BOOKS INC.
P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit No. 9546

Reed Jan. 30 1969
WEC

FIRST CLASS MAIL

MR BILL COSTA
408 W CRESCENT AVE
ALLENDALE NJ 07401

3

must be over the age of 21 years and sign statement to that effect above, to order. No

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

WHAT THEY SAY ABOUT THIS BOOK

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you, this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents.

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Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
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Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down to earth language which takes you instantly to the heart of the matter. This book was not written for the professional, although we fully expect that many professionals will insist upon having a copy of this book in a prominent position on their bookshelves.

Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure — simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience. And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE will sell for $12.95, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have our promise and one chance only to take advantage of this tremendous offer.

THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE ONLY $9.98

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE!

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station, New York, N.Y. 10017

Gentlemen:

Enclosed please find $
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below.

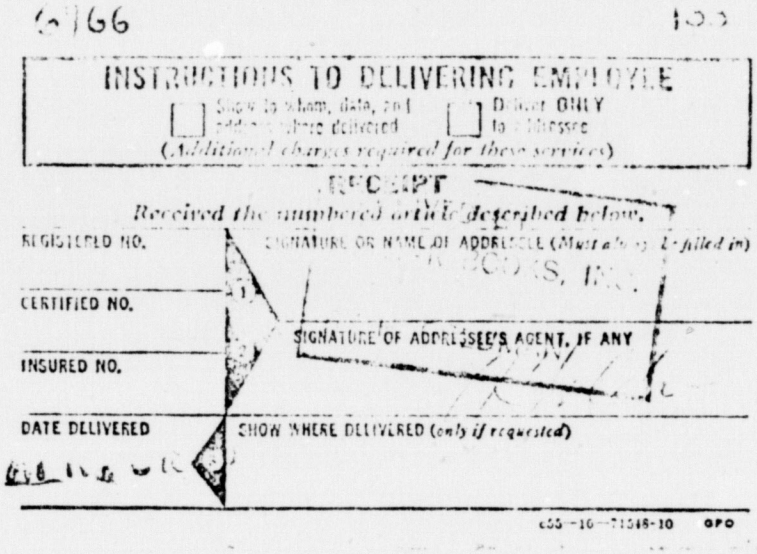
X ..... signature

Print Name ..... Age .....

Address .....

City ..... State ..... Zip .....

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date, and address where delivered ☐ Deliver ONLY to addressee

(Additional charges required for these services)

RECEIPT

Received the numbered article described below.

REGISTERED NO.

SIGNATURE OR NAME OF ADDRESSEE *(Must always be filled in)*

CERTIFIED NO.

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

INSURED NO.

DATE DELIVERED

SHOW WHERE DELIVERED *(only if requested)*

C55—10—71548-10 GPO

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

PENT-R BOOKS, INC.
Mailer

P.O. BOX 1555

NEW YORK, N.Y. 10017
and agents or assigns

PROHIBITORY ORDER

NO 6766

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

Mr Bill Costa 69
(Name of Addressee)

408 W Crescent Ave Allendale NJ 07401
(Address);

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

William Costa

ADDRESS: 408 W Crescent Ave
(Street)

Allendale NJ 07401 | NJ | 07401
(City) | *(State)* | *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

J. Kelly DIR ADM SVCS
FOR JOSEPH J. BENOCCI Postmaster
NEWARK NEW JERSEY 07102
City State ZIP Code

[POSTMARK]

Dated: APR 15 '69

POD Form 2152
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

1095a

6/70

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, Bill Costa (Print), addressee [parent of minor addressee] of the enclosed mailing from ~~[illegible] to~~ ~~Crescent~~ Ave P.O. Box 1555, Grand Central Stat. - NY (Print) 10017 ~~Allendale, NJ 07401~~, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

William A Costa — Signature
4-8-69 — Date
408 W Crescent Ave — Street
Allendale — City
NJ — State
07401 — ZIP Code

NAMES OF CHILDREN	BIRTH DATE
Steven	7-8-52

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1096a

PENT-R BOOKS INC.
P.O. Box 1555,
Grand Central Station
New York, N.Y. 10017

COSTA. B. 6766

BROOKLYN N. Y.

FIRST CLASS U. S. POSTAGE PAID 6c Permit # 9546

FIRST CLASS MAIL

Mr. Bill Costa
400 Crescent Ave.
Allendale, N.J. 07401

69

(6766)

6766

Rec'd Apr 7 1969
WFC

be over the age of 21 years and sign statement to that effect above, to order. No bo

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not wish this mail or if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.D.

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"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." L.B. & C.K. Chicago, Ill.

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Those who are considering marriage will want a copy of this book. Those who are married and are just beginning to find a certain tedium in their connubial bed will want to seek here for vital answers to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the gnawing, frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even abnormal. Yet your sex nature cries out for fulfillment. Which way shall you turn? What can you do? You can read this book and find the answer.

TRY IT . . . DON'T BUY IT . . . With our money back [illegible]

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this instruction book, we make this simple, straightforward guarantee: Order a copy of "THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE." Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving, pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE will sell for $12.95, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

[illegible]

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENT-R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

Enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper _____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

signature

Print Name. ..... Age .....

Address .....

City. ..... State ..... Zip. .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 599

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 599

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

AFFIDAVIT OF HERBERT MONTE LEVY

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding

an erroneous entry into the computer, ever be deemed a contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally, we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to

> request the Attorney General to make application, and the Attorney General is authorized to make application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out. This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Director of Administrative Services. We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

AFFIDAVIT OF HERBERT MONTE LEVY

> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e.,of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing

can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

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As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

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The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is not the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford

a basis upon which any factual findings could be made and an injunction issued, for the certification merely certifies "that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the complaining addressee. Thus, the only papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory

order. Thus, the entire case must fall as being without a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case. Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General. In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General. It was not even issued by a local postmaster. It was issued, on the contrary, by the Director of Administrative Services.

We are not aware of any delegation to such an officer of the power to issue a prohibitory order, and if there was any such delegation of authority, pursuant to any rule or regulation, we are aware of no statute which would authorize such delegation to the Director of Administrative Services.

The prohibitory order prohibited a mailing to (possibly among others) a person by the name of William Costa . However, the second alleged mailing was not to such person, but was addressed to a different name, to wit, Bill Costa , a person not named in the prohibitory order as one to whom a mailing was prohibited. Thus, there was clearly no violation of the prohibitory order.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due

process of law under the Fifth Amendment and the right to know the nature and cause of the accusation against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act

(28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason for permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble

caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in the case purportedly pending in this Court of United States v. Pent-R Books, 72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster

or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed

in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert

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attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced

with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness, judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The alleged receipt purporting to show the date of receipt, purportedly initialled by the complaining addressee, does not clearly show the date it was received. It merely recites "received," or a word or words to such effect. The next line sets forth the initials of the addressee. This may well show the date

the Post Office received the material from the complaining addressee, rather than the date that the complaining addressee received the second mailing from the defendant. It certainly is not proof that this was the date of receipt by the complaining addressee of the defendant's second alleged mailing.

The proof of date of receipt of the second alleged mailing merely purports to show the date upon which it was received -- but in no way, shape or form does it set forth by whom it was received on such date. It could mean received by the Post Office, it could mean received by anyone, and there is simply no signature to even vouch for such a date of receipt -- even by the Post Office.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, neither the complaint nor the order were issued even by a local Postmaster, but were issued by the Director of Administrative Services.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Allendale, N.J. , the address to which the first mailing was made, but out of Newark, New Jersey . We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases,

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which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this

5th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Newark, N.J. 07102

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: Pent-R Book, Inc.
ads. P.O. (Corta)
P.O. Docket No. NK-69-6766-133

DATED: July 18, 1969

Client has received the Complaint in the above matter, dated July 2, 1969. We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionality both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Book Bargains, Inc. ads. P.O. (Wilson), P.O. Docket No. NK-69-6766.] We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses to witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was or is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here (is) (are) (a nullity) (nullities). If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the effective date of the Prohibitory Order, the Complaint fails to state a cause of action. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. Except for copies of the envelopes, no copies of either mailing are annexed.

Herbert Monte Levy

1127a

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

September 8, 1969

William Lawrence, Esq.,
Assistant General Counsel
Availability Division
Post Office Department
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads.	P.O. (Metheny)	No. R5-P-292
" " "	P.O. (Stasiak)	No. R5-P-291
" " "	P.O. (Coffin)	No. NK-69-6370-121
" " "	P.O. (Costa)	No. NK-69-6766-133
" " "	P.O. (Ferguson)	No. PH-69-5342-77
" " "	P.O. (McElravy)	No. BosP 69-35

Again I must appeal to you from the Orders and/or Hearing Denials in the above matters, all of which were received by me last week, asking that you consider this as a notice of appeal and a brief in support thereof, and incorporating by reference the arguments previously made in my varying letters to you.

I am particularly concerned about the first two matters indicated above, wherein the demand for hearing was mailed eight (8) days after we received the complaint, and, moreover, the Order deciding that the Prohibitory Order had been violated was dated one day prior to the date that the complaint was received.

May we have a prompt ruling on all these matters, and also your advice as to whether I should send copies of demands for hearings to you and/or the Postmaster General in order to expedite matters. My files are, indeed, getting rather clogged with all these matters.

Sincerely,

Herbert Monte Levy

HML/mol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 599

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PRECAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for"The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in

publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used,

we submit that not only does defendant have no intent of violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months --

which it computes as the equivalent of one person working 3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus,

although we received something more than 200,000 prohibitory orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were

handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there

are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints,(only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt). A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received

from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant. They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant

found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which

now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant,

who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of

mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue,

New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated

from the RAS list. Thus, any Schwartz, Schwartzman, Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say, 1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

(0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem

those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750 complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized

method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement.

AFFIDAVIT OF RICHARD S. SCHWARTZ

Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

AFFIDAVIT OF RICHARD S. SCHWARTZ

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November.

GILSOM SAFDEYE
Notary Public, State of New York
No. 34[illegible]78
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBIT, ANNEXED TO DEFENDANT'S CROSS-MOTION.

ABOUT YOUR SUBSCRIPTION

Your subscription to POPULAR PHOTOGRAPHY is maintained on one of the world's most modern, efficient computer systems, and if you're like 99% of our subscribers, you'll never have any reason to complain about your subscription service.

We have found that when complaints do arise, the majority of them occur because people have written their names or addresses differently at different times. For example, if your subscription were listed under "William Jones, Cedar Lane, Middletown, Arizona," and you were to renew it as "Bill Jones, Cedar Lane, Middletown, Arizona," our computer would think that two separate subscriptions were involved, and it would start sending you two copies of POPULAR PHOTOGRAPHY each month. Other examples of combinations of names that would confuse the computer would include: John Henry Smith and Henry Smith; and Mrs. Joseph Jones and Mary Jones. Minor differences in addresses can also lead to difficulties. For example, to the computer, 100 Second St. is not the same as 100 2nd St.

So, please, when you write us about your subscription, be sure to enclose the mailing label from the cover of the magazine—or else copy your name and address exactly as they appear on the mailing label. This will greatly reduce any chance of error, and we will be able to service your request much more quickly.

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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley:* Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller, Burton McNeeley, undersea photographer, John Schearer, free-lance photographer, Larry Schiller, film maker, Paul Huc, photographer from Holland; Martin Dufy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippines; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths.*

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image.*

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland.*

Kyoichi Sawada, U.P.I. photographer, killed in Phompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for [illegible]ture of Vietnamese mother fleeing enemy attack.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

AFFIDAVIT

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.
----------x

STATE OF NEW YORK)
:ss.:
COUNTY OF KINGS)

HYMAN GOLDMAN, being duly sworn, deposes and says that:

I am and at all times from 1968 to date have been employed by PENT-R BOOKS, INC., sued as PENT-R-BOOKS, INC. herein, as a messenger. Accordingly, I was the person who most often went to the Post Office to pick up registered mail, which was held for defendant at the Post Office Registry window. I have been asked to describe the way in which this was handled. I now do so.

When I asked to sign a return receipt, it was not my practice to write down the date on the return receipt on

which the material was received. This would usually be written, by stamp or otherwise, by the Post Office employee behind the Registry window. Sometimes this was done while I was waiting, at other times dates were stamped on some receipts after I had signed them, or while I was still signing other receipts. At still other times, the person behind the window would stamp the date of receipt, I assume, after I left, for such person had not stamped the receipts with the date prior to to my leaving.

I did not have an opportunity to always see what material I was getting before I signed for it. On numerous occasions, particularly when a lot of registered mail was received, -- as was the case in 1969 particularly --, I was on many occasions given a batch of return receipts to sign at the same time, or a manifest sheet listing numerous items. Only after I signed them would I then be given the materials that I had supposedly signed for. Thus, on numerous occasions, I had no opportunity whatsoever to check to see whether all of the material for which I signed had been received.

AFFIDAVIT OF HYMAN GOLDMAN IN SUPPORT OF DEFENDANT'S CROSS-MOTION

There were of course many opportunitities for errors. Thus, the person behind the window could have put on the wrong date of receipt; I might not have been given a mailing piece for which I signed; I might have been given a mailing piece for which I signed one or more days after the date on which the receipt was supposedly stamped. And the opportunity for errors to be had was aggravated by the fact that, in 1969, there were frequent occasions when I had to sign for between 30 and 50 mailing pieces at the same time.

Thus, the fact that a return receipt bears a particular date does not necesrarily prove that it was received by Pent-R Books, Inc. on the date that the return receipt shows.

Hyman Goldman

HYMAN GOLDMAN

Sworn to before me
this 2nd day of November, 1973.

Gilsom Safdeye

GILSOM SAFDEYE
Notary Public, State New York
No. 34
Qualified
Commission Expires , 19 75

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

: 72 C 599
(COSTA)

--against-

: MEMORANDUM
and
ORDER

PENT-R-BOOKS, INC.,

:

Defendant.

- -X

Appearances:

LLOYD H. BAKER, Esq. (DAVID G. TRAGER, Esq., United States Attorney, of Counsel) for Plaintiff

HERBERT MONTE LEVY, Esq., for Defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order issued under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. All objections of defendant in this action were raised and disposed of in 69 C 1362, 72 C 606, and 72 C 609, and what has been said in those dockets need not be repeated here. Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York
July 29, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.

72 C 599
(COSTA)
JUDGMENT

- -X

This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, its agents and assigns (1) refrain from any further mailings to WILLIAM COSTA, 408 W. CRESCENT AVE., ALLENDALE, N.J. 07401, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from [illegible]

sale, rental, exchange or other transaction involving mail lists bearing the name of the party named above.

Brooklyn, New York

July 29, 1974.

Approved:

U. S. D. J.

CLERK

UNITED STATES DISTRICT COURT,

FOR THE EASTERN DISTRICT OF NEW YORK.

----------X

UNITED STATES OF AMERICA,

Plaintiff,

v.

PENT-R-BOOKS, INC.,

Defendant.

----------X

CIVIL ACTION NO. 72C 600.

DOCKET ENTRIES

72 C 600

U.S.A. v. PENT R BOOKS INC.

	FILINGS - PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURN
5/9/72	Complaint filed. Summons issued.	1JS5
5-26-72	Summons returned and filed. Deft srvd 5-25-72.	2
9-27-73	Plftt's notice of motion ret 10-15-73 and memo in support of motion for summary judgment filed.	3/4
11-29-73	Notice of cross motion and memorandum in support of deft's cross motion for summary judgment filed.	5/6
7/29/74	By Dooling,J.-Memo & Order dd 7/26/74 granting pltff's motion for summary judgment & denying deft's cross-motion for same filed.	7
7/29/74	Judgment granting pltff's motion for summary judgment filed., dtd 7/26/74 (P/C MAILED TO ATTYS)	8
9-19-74	Notice of appeal filed. Duplicate mailed to C of A & pltff. jn	9
9-5-75	Record on appeal certified andhanded to Sam Ratchick for delivery to C of A.	

A TRUE COPY
SEP 5 1975
LEWIS ORGEL
CLERK
BY DEPUTY CLERK

LEWIS ORGEL
CLERK

By: MARC MILLER
DEPUTY CLERK

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

RENT-R BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

COMPLAINT

Civil Action
No.

Plaintiff, UNITED STATES OF AMERICA, by its attorney, ROBERT A. MORSE, United States Attorney for the Eastern District of New York, complaining of the defendant, alleges:

1. This Court has jurisdiction of this action pursuant to Public Law 90-206, Sec. 301 and Title 28, U.S.C., Sec. 1345.

2. The defendant is a New York corporation having an office for the conduct of business at 203 Kings Highway, Brooklyn, New York.

3. On or about May 2, 1969, defendant mailed or caused to be mailed through the U. S. mail to George Kiyak, Westwood, New Jersey (hereinafter referred to as "addressee") material offering for sale certain advertisement of Photographic Manual of Sexual Intercourse.

4. The said item was mailed from Brooklyn, New York, within the Eastern District of New York.

5. The above-described mailing consisted of photographic advertisements which the addressee believes to be erotically arousing or sexually provocative.

6. The addressee requested the Postmaster General to issue an order directing defendant, its agents or assigns, to refrain from further mailings of such material to him.

7. Upon receipt of this request and pursuant to Public Law 90-206, Sec. 301, on May 8, 1969, the local Postmaster, by order of the Postmaster General, issued Prohibitory Order No. 7839, which ordered and directed defendant, its agents and assigns, to delete his name from any sales or transactions involving lists bearing his name, effective 30 days after receipt of the order.

8. A copy of the order was mailed to defendant by registered mail on or about the date it bears.

9. Thereafter, the Postmaster General had reason to believe that defendant or someone acting on its behalf violated the order.

10. On or about July 10, 1969, in violation of Prohibitory Order No. 7839, defendant, or someone acting on its behalf, mailed or caused to be mailed through the

United States mail to the addressee, material such as that described in paragraph 3 of the complaint.

11. On July 22, 1969, the local Postmaster, by order of the Postmaster General, issued a complaint advising that evidence had been received that defendant, or someone acting on its behalf, had violated Prohibitory Order No. 7839, and advising defendant that any response for hearing had to be filed within 15 days.

12. A copy of the complaint was mailed to defendant by registered mail on or about the date it bears.

13. Defendant did not request a hearing or otherwise respond to the complaint.

14. On November 19, 1969, a determination was made that defendant or someone acting on its behalf had violated Prohibitory Order No. 7839.

15. A copy of the determination was mailed to defendant by registered mail on or about the date it bears.

16. The Postmaster General thereafter requested the Attorney General, pursuant to the provisions of Public Law 90-206, Sec. 301, to make application to a district court of the United States for an order directing defendant to comply with the order.

COMPLAINT

WHEREFORE, plaintiff, UNITED STATES OF AMERICA, prays:

a. That the court enter judgment herein requiring defendant, its agents and assigns, to comply with Prohibitory Order No. 7839, and more specifically, that this Court order and direct defendants, its agents and assigns, in conformity with this order to cease and desist from making any further mailings to the designated addressee from all mailing lists owned or controlled by defendant, its agents or assigns, and to refrain from selling, renting, exchanging, or engaging in any other transaction involving mailing lists bearing the name of said addressee.

b. That the Court grant to plaintiff such other and further relief as may be just and proper.

ROBERT A. MORSE
United States Attorney
Eastern District of New York
Attorney for Plaintiff
225 Cadman Plaza East
Brooklyn, New York 11201

By
Lloyd H. Baker
Assistant U. S. Attorney

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - X

UNITED STATES OF AMERICA,

Plaintiff,

- against -

PENT-R-BOOKS, INC.,

Defendant.

- - - - - - - - - - - - - - - - - - - X

NOTICE OF MOTION

72 C 600

PLEASE TAKE NOTICE that upon the annexed certified copy of the record of the proceeding in the Post Office Department, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court at a term for the hearing of motions to be held at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, Courtroom 8, on the 13th day of October, 1973, at 9:30 o'clock in the ~~forenoon~~ afternoon of that day, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 56 granting summary judgment

GOVERNMENT'S NOTICE OF MOTION FOR SUMMARY JUDGMENT

to the plaintiff, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated: Brooklyn, New York
September 26, 1973

ROBERT A. MORSE
United States Attorney
Attorney for the United States of AMERICA

By:

Lloyd H. Baker
Assistant U. S. Attorney

TO:

HERBERT MONTE LEVY, ESQ.
295 MADISON AVENUE
NEW YORK, NEW YORK 10017

1168a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS.

UNITED STATES OF AMERICA

POST OFFICE DEPARTMENT

Washington, D.C. 20260

[illegible], 19 [illegible]

C E R T I F I C A T I O N

I hereby certify that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit: [illegible]

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the Post Office Department to be affixed, on the day and year first above written.

POD SEAL

William F. Lawrence
Assistant General Counsel
Mailability Division

POD Form 2159
Sep. 1969

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

ORDER

In the Matter of Violation of Prohibitory Order No. 7839
Issued Against

PERE-B-BOOKS INC

P.O. BOX 1565

NEW YORK, NY 10017

and agents or assigns, pursuant to authority of Title 39, U.S. Code, §4009.

P. O. Docket No. NK-69-7839-138

Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned Prohibitory Order.

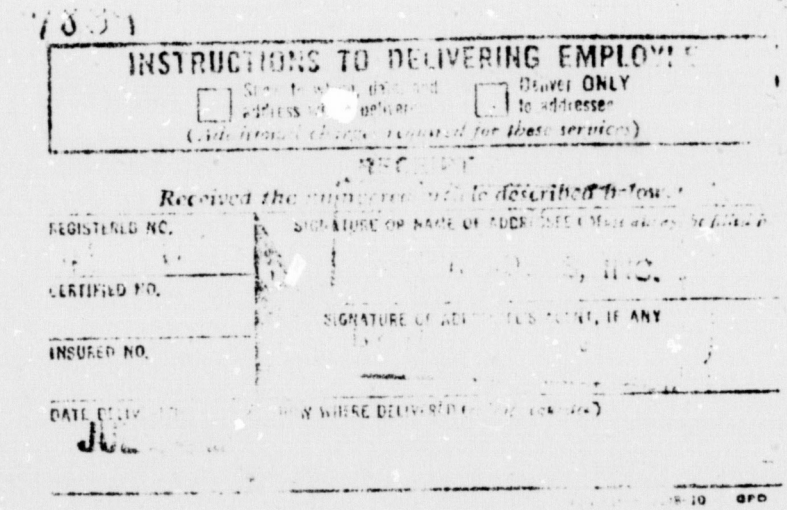
J. Kelly
Postmaster DIR ADM SVCS
FOR JOSEPH J. BENUCCI
NEWARK NEW JERSEY 07102
City State ZIP Code

[POSTMARK] NEWARK, N.J. NOV 19 1969 USPO

Dated:

POD Form 2154
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



INSTRUCTIONS TO DELIVERING EMPLOYEE

☐ Show to whom, date and address of delivery

☐ Deliver ONLY to addressee

(Additional charges required for these services)

Received the numbered article described below.

REGISTERED NO.

CERTIFIED NO.

INSURED NO.

SIGNATURE OR NAME OF ADDRESSEE (Must always be filled in)

SIGNATURE OF ADDRESSEE'S AGENT, IF ANY

DATE DELIVERED

(POSTMARK FOR DELIVERY WHERE DELIVERED THE SAME DAY AS RECEIVED)

10 GPO

1171a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT

COMPLAINT

In the Matter of Violation of
Prohibitory Order No. 7839
Issued Against

PENT-R-BOOKS INC

P. O. BOX 1555

NEW YORK NY 10017

and agents or assigns.

On behalf of:

Mr. George Kiyak
Complaining Addressee

P. O. Docket No. NK-69-7839-138

On the 9th day of May, 19 69, you received Prohibitory Order No. 7839, copy of which is attached hereto, issued against you and your agents or assigns under authority of Title 39, U.S. Code, §4009, upon request of the above-named addressee.

Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows:

1. By further mailings to the addressees listed in the order. See Exhibit attached hereto.
2. You failed to immediately delete from mailing lists owned or controlled by you or your agents or assigns the names of the addressees listed in the order. See Exhibit attached hereto.
3. You or your agents or assigns have sold, lent, exchanged, or made other transactions involving mailing lists bearing names of addressees listed in the order. See Exhibit attached hereto.
4. Other (specify):

[Strike inapplicable items].

Any response to this Complaint or request for a hearing with respect thereto must be filed, in writing, in the Office of the Regional Counsel, Post Office Department, [redacted] (Address)

[redacted] with the undersigned Postmaster, within fifteen (15) days after receipt of this Complaint. Attached hereto is copy of the Department's Rules of Practice relative to answering this Complaint and requesting a hearing in the matter.

[POSTMARK] NEWARK, N. J. JUL 22 1969 USPO

Dated:

J Kelly
Postmaster
FOR JOSEPH J. BENUCCI
NEWARK NEW JERSEY 07102
City State ZIP Code

POD Form 2153
May 1968

1172a

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

P. O. BOX 81
BROOKLYN, N Y 11223

George Kinzak

BROOKLYN

REFUSED

2152

FIRST CLASS MAIL

24
CLIFTON NJ 07012

This envelope contains certified copies of U. S. Post Office Orders
bearing for which I have paid
this mailing
U.S. Post

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

READ WHAT OTHERS ARE SAYING ABOUT THIS BOOK

"This is the best down-to-earth book of its kind I have ever read about the point-by-point sex techniques depicted, the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. J. M.

"This book was a whole new method and approach to sex. I never knew." Mr. & Mrs. D.K., Los Angeles, Calif.

I only wish I had seen this book early in my married life. My marriage really failed for just those reasons which are covered in the first seven chapters of this book. If only I had known what this book tells me now, I'm sure we could have remained married.

We expect to be married in a few months. We feel that this book will help us all to a good start in several matters. Thank you very much." J.B., C.K., Chicago, Ill.

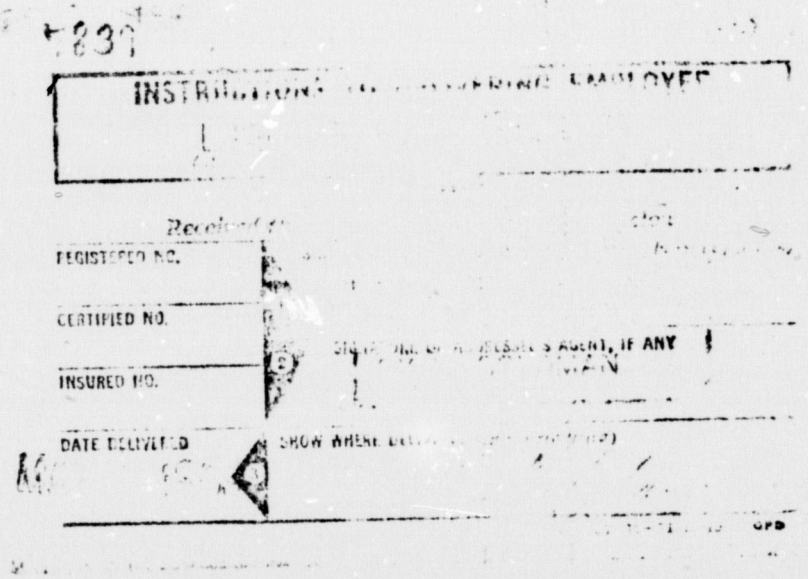
TABLE OF CONTENTS

Preface	
Chapter I	History of Sex
Chapter II	Dimensions of Sex
Chapter III	Philosophy of Sex
Chapter IV	You and Sex
Chapter V	Male and Female Sex Organs
Chapter VI	Art of Love Making
Chapter VII	Positions for Sexual Intercourse
Chapter VIII	Female Oral-Anal Sexuality
Chapter IX	Male Oral-Anal Sexuality
Chapter X	Female Technique for Satisfying the Male
Chapter XI	Male Technique for Satisfying the Female
Chapter XII	Sexual Intercourse During Menstruation and Pregnancy
Chapter XIII	Satisfying Substitutes
Chapter XIV	Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV	Compiling Your Own Handbook

OUR GUARANTEE

TRY IT . . . DON'T BUY IT. With our most liberal offer. We have put a great deal of time, money and effort into the book. We have strong beliefs about the book. We feel this book has been needed in our society of sexual confusion and misinformation. We feel this book will be of immense value to thousands of men and women. It is our sincerity and belief in the truth we have in this material that we make this simple straightforward guarantee to you. Order a copy of *THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE*. Read it. Have your wife read it. After reading this book you do not feel convinced in your own mind that sex, and your partner, is one thousand per cent better and more exciting and pleasurable, simply return the book for a prompt and courteous refund of your purchase price. We will be happy to refund it. We don't want your money. You have nothing to lose but the fun and excitement you will have in the years to come. It will be an important part of your life that you'll be glad you have. Your partner in sex will be glad you have. It will be the most helpful sex book you have ever read. Please, we make this guarantee because we want you to be happy. And please remember, you must not have your money refunded unless you return the book. Don't miss out on this opportunity to learn more about sex. Don't miss out on this opportunity to learn more about sex. Don't miss out on this opportunity to learn more about sex

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS



CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
PROHIBITORY ORDER

In the Matter of

NEXT-R BOOKS, INC.
Mailer

P.O. BOX 1555

NEW YORK, N.Y. 10017
and agents or assigns

PROHIBITORY ORDER
NO. 7839

WHEREAS, we were furnished a mailing piece containing advertising matter which you mailed or caused to be mailed to

O Kiyak 09 2 72
(Name of Addressee)

24 De Berg Dr RD1 Westwood NJ 07675
(Address);

and

WHEREAS, said addressee has determined your advertisement to be a pandering advertisement offering for sale erotically arousing or sexually provocative matter; and

WHEREAS, said addressee has requested the issuance of an order pursuant to the provisions of Title 39, U.S. Code, §4009, a copy of which law is printed on the reverse side hereof, directing you and your agents or assigns, to refrain from making any further mailings to him [and his minor children residing with him who have not attained their nineteenth birthday].

NOW, THEREFORE, pursuant to the cited statute, you, your agents and assigns, are hereby ordered:

(1) To refrain from any further mailings to the following parties at the indicated address, or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder, resident, boxholder, postal patron, rural route boxholder, and local, effective on the 30th calendar day after receipt of this order:

George Kiyak — Christopher Kiyak
Mark " — Gregory "

ADDRESS: 24 De Berg Drive
(Street)

Old Tappan — NJ — 07675
(City) *(State)* *(ZIP Code)*

(2) To immediately delete the above-named parties from all mailing lists owned or controlled by you or your agents or assigns.

(3) To immediately abstain from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the parties mentioned above.

J Kelly DIR ADJ SVCS
FOR JOSEPH J. BENUCCI Postmaster
NEWARK NEW JERSEY 07102
City State ZIP Code

[POSTMARK]

NEWARK, N. J. MAY 8 1969 USPO

Dated:

POD Form 2152
May 1968

"§4009. Prohibition of pandering advertisements in the mails

"(a) Whoever for himself, or by his agents or assigns, mails or causes to be mailed any pandering advertisement which offers for sale matter which the addressee in his sole discretion believes to be erotically arousing or sexually provocative shall be subject to an order of the Postmaster General to refrain from further mailings of such materials to designated addressees thereof.

"(b) Upon receipt of notice from an addressee that he has received such mail matter, determined by the addressee in his sole discretion to be of the character described in subsection (a) of this section, the Postmaster General shall issue an order if requested by the addressee, to the sender thereof, directing the sender and his agents or assigns to refrain from further mailings to the named addressees.

"(c) The order of the Postmaster General shall expressly prohibit the sender and his agents or assigns from making any further mailings to the designated addressees, effective on the thirtieth calendar day after receipt of the order. The order of the Postmaster General shall also direct the sender and his agents or assigns to delete immediately the names of the designated addressees from all mailing lists owned or controlled by the sender or his agents or assigns and, further, shall prohibit the sender and his agents or assigns from the sale, rental, exchange, or other transaction involving mailing lists bearing the names of the designated addressees.

"(d) Whenever the Postmaster General believes that the sender or anyone acting on his behalf has violated or is violating the order given under this section, he shall serve, upon the sender, by registered or certified mail, a complaint stating the reasons for his belief and request that any response thereto be filed in writing with the Postmaster General within fifteen days after the date of such service. If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make application, to a district court of the United States for an order directing compliance with such notice.

"(e) Any district court of the United States within the jurisdiction of which any mail matter shall have been sent or received in violation of the order provided for by this section shall have jurisdiction, upon application by the Attorney General, to issue an order commanding compliance with such notice. Failure to observe such order may be punished by the court as contempt thereof.

"(f) Receipt of mail matter thirty days or more after the effective date of the order provided for by this section shall create a rebuttable presumption that such mail was sent after such effective date.

"(g) Upon request of any addressee, the order of the Postmaster General shall include the names of any of his minor children who have not attained their nineteenth birthday, and who reside with the addressee.

"(h) The provisions of subchapter II of chapter 5 (relating to administrative procedure) and chapter 7 (relating to judicial review) of part I of title 5, United States Code, shall not apply to any provisions of this section.

"(i) For the purposes of this section—

"(1) mail matter, directed to a specific address covered in the order of the Postmaster General, without designation of a specific addressee thereon, shall be considered as addressed to the person named in the Postmaster General's order; and

"(2) the term 'children' includes natural children, stepchildren, adopted children, and children who are wards of or in custody of the addressee or who are living with such addressee in a regular parent-child relationship."

(b) The table of contents of chapter 51 of title 39, United States Code, is amended by adding at the end thereof—

"4009. Prohibition of pandering advertisements in the mails."

SEC. 302. The provisions of this title shall become effective on the one hundred and twentieth day after the date of enactment of this Act.

Effective Date: 4-15-68.

1177a

18-1

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

POST OFFICE DEPARTMENT
NOTICE FOR PROHIBITORY ORDER AGAINST SENDER OF PANDERING ADVERTISEMENT IN THE MAILS

I, GEORGE KIYAK (Print), addressee [parent of minor addressee] of the enclosed mailing from PENT R BOOKS INC (Print)
P O Box 81
BROOKLYN, N.Y. 11223, consider this mailing to be a pandering advertisement which offers for sale erotically arousing or sexually provocative matter.

Accordingly, under the provisions of Title 39, United States Code, §4009, I request that the above-named mailer, and his [its] agents or assigns, be directed to refrain from making any further mailings to me [as well as to my below-listed minor children residing with me who have not attained their nineteenth birthday].

George Kiyak — Signature — 5/2/69 — Date

24 DE BERG DR — Street

OLD TAPPAN — City — NJ — State — 07675 — ZIP Code

NAMES OF CHILDREN	BIRTH DATE
GREGORY	4/18/55
MARK	10/1/58
CHRISTOPHER	11/3/60

NOTE: This notice must be accompanied by the objectionable advertisement and the envelope, or other mailing wrapper, in which the advertisement was received.

POD Form 2150
May 1968

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

1178a

KIYAK. G. 7829

PENT-R BOOKS INC.

P. O. BOX 81
BROOKLYN, N. Y. 11223

BROOKLYN N. Y.

FIRST CLASS U.S. POSTAGE PAID 6c Permit # 9546

FIRST CLASS MAIL

7829

72

...over the age of ... and sign statement ... at address above to order

PERSONAL

NOTICE TO ADDRESSEE

This envelope contains an UNSOLICITED ILLUSTRATED BROCHURE offering for sale to Adults Only, a new marriage manual. If you do not ... if you are not over the age of 21 years, DO NOT OPEN THIS ENVELOPE! Simply mark this envelope "REFUSED", sign your initials and return it to your mailman. Upon the return of this envelope, we will endeavor to remove your name from our mailing list. Thank You.

CERTIFIED COPIES OF U. S. POST OFFICE ORDERS

"This is the best done book of its kind I have ever seen. I was concerned about the frank way in which the photographs depicted the various positions of sex, but the publishers assured me that this book would be offered only to adults." Dr. T.M.E.

"This is the first marriage manual I've seen that didn't beat around the bush." Mrs. W.R. New York City.

"This book gave us a whole new outlook on sexual possibilities we never knew existed." Mr. & Mrs. J.K., Los Angeles, Calif.

"I wish this book had been published 12 years ago when we were first married." Mr. & Mrs. A.S., New York City.

"I only wish I had seen this book early in my married life. My marriage finally failed for just those reasons which are covered in chapter Seven of this book. If only I had known what this book now makes so clear." Divorcee who was asked to comment.

"We expect to be married in a few months. We feel that this book will help get us off to a good start in sexual matters. Thanks very much." T. B. & C.K. Chicago, Ill.

TABLE OF CONTENTS

With the final chapter just complete a few short weeks ago, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** is the latest, most up-to-date sex manual on the market. It is the sex of today which is presented to you; this is no compilation of ancient wisdom. People change, even the techniques of sex change. This is today's guide to sexual intercourse written for today's people! We ask you to review the table of contents:

Preface
Chapter I ..... History of Sex
Chapter II ..... Dimensions of Sex
Chapter III ..... Philosophy of Sex
Chapter IV ..... You and Sex
Chapter V ..... Male and Female Sex Organs
Chapter VI ..... Art of Love Making
Chapter VII ..... Positions for Sexual Intercourse
Chapter VIII ..... Female Oral-Anal Sexuality
Chapter IX ..... Male Oral-Anal Sexuality
Chapter X ..... Female Technique for Satisfying the Male
Chapter XI ..... Male Technique for Satisfying the Female
Chapter XII ..... Sexual Intercourse During Menstruation and Pregnancy
Chapter XIII ..... Satisfying Substitutes
Chapter XIV ..... Sexual Intercourse for the Old, Ill and Handicapped
Chapter XV ..... Compiling Your Own Handbook

We venture to suggest that no three books taken as one, offer the complete coverage of this single volume. The above table of contents but suggests the scope of what is offered. Each chapter is a model of clarity, of down to earth language which takes you directly to the heart of the matter. This book was not written for the prudish, although we fully expect that many prudish will insist upon having a copy of this book in a prominent spot on their bookshelves.

Those [illegible] considering marriage will want a copy of this book. Those who are married and are just beginning to find a few problems in their connubial bed will want to seek here for [illegible] to their problem. Those who are ill, old, or handicapped will realize that their sex life need not be the frustrating problem it now seems to be.

Perhaps you have feelings which you think are unnatural, even perverted. Yet your sex nature cries out for fulfillment. Which way should you turn? What can you do? You can read this book and find the answer.

TRY IT . . . DON'T BUY IT . . . With our money back offer!

We, as the publisher, have put a great deal of time, money and effort into this book. We have strong feelings about this book. We feel this book has long been needed in our society of sexual confusion and maladjustment. We feel this book will be of immense value to thousands of men and women. To convince you of our sincerity and of the faith we have in this marvelous book, we make this simple, straightforward guarantee to you. Order a copy of **"THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE."** Read it. Have your wife read it. If after reading this book, you do not feel powerful in your new knowledge of sex, if you and your partner are not enjoying new heights of sexual excitement and pleasure, simply return the book. Every penny of your purchase price will be immediately refunded. What could be fairer than that? You have nothing to lose but the few moments it takes to fill out and mail the enclosed order form. If sex is an important part of your life, you owe it to yourself and to your sex partner to take advantage of this pioneering book of sexual knowledge. And only once will you have the opportunity to take advantage of this money saving pre-publication special offer. Please act today. A postage paid reply envelope is enclosed for your convenience! And please remember, you are trying, not buying, because if you are dissatisfied for any reason, your money is returned without question or delay! Please order today! Both you and your wife will be glad that you did!

SPECIAL PRE-PUBLICATION OFFER

When it is published, **THE PHOTOGRAPHIC MANUAL OF SEXUAL INTERCOURSE** will sell for $12.98, and at that price it will be a fantastic bargain. But now, in a special pre-publication offer, you can purchase this first-of-a-kind book for only $9.98 and save $3 for a limited time only. This special pre-publication offer will not be repeated again. You have one chance and one chance only to take advantage of this tremendous offer.

YOU MUST BE OVER THE AGE OF 21 YEARS TO ORDER. No books will be shipped to unmarried minors.

USE ENCLOSED ORDER FORM AND POSTAGE PAID ENVELOPE

PENT R BOOKS, INC. P.O. Box 1555
Grand Central Station New York, N.Y. 10017

Gentlemen:

I enclosed please find $ .....
[ ] Cash [ ] Check [ ] Money Order

Please rush me in plain sealed wrapper ____ copies of "The Photographic Manual Of Sexual Intercourse" at the special pre-publication price of $9.98.

I understand that I may return the book within 10 days after I receive it for an immediate refund of the purchase price.

I hereby represent that I am over the age of 21 years and I have signed to that effect below:

X .....
signature

Print Name. ..... Age. .....

Address. .....

City. ..... State. ..... Zip. .....

DEFENDANT'S NOTICE OF CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant.

----------x

NOTICE OF CROSS MOTION.

Docket No.
72 C 600

The defendant upon the annexed affidavits, cross-moves the Court as follows:

1. To dismiss the action, without prejudice to restoring it to the calendar upon a further showing of a further alleged violation of the law, under the general principles of equity discretion.

2. To grant summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

3. To vacate the purported prohibitory order issued in this case.

DEFENDANT'S NOTICE OF CROSS-MOTION

4. To grant such other, further and different relief as to the Court may seem just and proper in the premises.

SIGNED:

HERBERT MONTE LEVY
Attorney for Defendant
295 Madison Avenue
New York, New York 10017
689-2220

AFFIDAVIT OF HERBERT MONTE LEVY IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.,

Defendant,

----------x

ANSWERING AFFIDAVIT OF HERBERT MONTE LEVY, Esq.

Docket # 72 C 600

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

HERBERT MONTE LEVY, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the attorney for PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment, and in support of our cross-motion for summary judgment. I am personally and fully familiar with all the facts set forth herein.

At the outset, I note that this case is thoroughly moot, and that there is no case or controversy presently pending before this Court; any order entered by this Court enforcing the prohibitory order (hereinafter sometimes PO) would be a useless order. As shown by the annexed affidavit

AFFIDAVIT OF HERBERT MONTE LEVY

of RICHARD S. SCHWARTZ, the defendant has taken every precaution humanly possible -- and more so -- using every possible available computer technology, to insure that second mailings are not made to persons in regard to whom PO's have been issued. Indeed, I myself have asked the Justice Department representatives whom I met with on this case on September 25, 1973 in Washington D.C. -- Messrs. Schiffer and Cogbil -- whether they had any suggestions as to how my client might take any better precaution to insure against violations, and they were silent on this score. Nor has the Assistant United States Attorney in charge of this case locally, Lloyd Baker, Esq., ever been able to suggest any additional precautions which my client should take.

Not only has my client taken every precaution to avoid the possibility of a second mailing, but my client's position, as stated in the annexed affidavit of Mr. Schwartz, is that it has no intention whatsoever of violating any PO, that under its existing computer technology it cannot violate the PO even if it wanted to; accordingly, there is not only no threat of violation of a PO, but no possibility of violation of the PO (barring computer error). Certainly, a computer error could not be the basis for any finding of a contempt, nor could a human error, perhaps by feeding an erroneous entry into the computer, ever be deemed a

contempt. Hence, since nothing can be accomplished by any order to be entered, and since there is neither threat nor possibility of an intentional violation of a Court order, there is no ground for equity to issue an injunction. Certainly, in its discretion, no injunction should issue. The case, too, is clearly moot, and we cannot see how there is any case or controversy within the meaning of the United States Constitution, which would give this Court jurisdiction.

Nonetheless, though we note this plea in bar because of lack of jurisdiction, because of lack of case or controversy, mootness, and no threat or intent by the defendant to act illegally. we now turn to other aspects of the matter.

Irrespective of what we have set forth above, and what we set forth below, this case -- along with all the other related cases -- must be dismissed for the failure of the Postmaster General to make the final finding and order that he is required to make before any jurisdiction can attach in this Court. Thus, Subsection D of Section 4009 provides as follows:

> "If the Postmaster General, after appropriate hearing if requested by the sender, and without a hearing if such a hearing is not requested, thereafter determines that the order given has been or is being violated, he is authorized to request the Attorney General to make application, and the Attorney General is authorized to make

> application, to a District Court of the United States for an order directing compliance with such notice."

Thus, the Postmaster General must determine that the order given -- the prohibitory order -- has been or is being violated. Yet neither the order in this case, nor in any of the companion cases, makes any such determination. In fact, no determination whatsoever was made by the Postmaster General. The order itself, a form order, merely recites as follows:

> "Satisfactory evidence having been presented that you, or your agents or assigns, acted in violation of the above-captioned Prohibitory Order, the Attorney General of the United States is being requested to give consideration to making application to a District Court of the United States for an Order directing compliance with the above-captioned prohibitory order."

The mere claim, or fact, that satisfactory evidence was presented that defendant acted in violation of a prohibitory order, does not constitute a determination that defendant had violated or was violating the prohibitory order.

Satisfactory evidence could be presented to show a violation, and there could be evidence presented contra as well. Thus, there was simply no determination required by statute, but merely a recital that a prima facie case had been made out.This is totally different from a determination having been made of a violation.

Moreover, even had a determination been made, the statute required such a determination to be made by the Postmaster General. The determination here, such as it was, was made by a Director of Administrative Services . We are aware of no delegation of authority to a Postmaster to make such a determination, and for such a local official to make a request to the Attorney General of the United States. Yet that is apparently what happened here. Moreover, if there were any such purported delegation pursuant to either regulation or rules, we know of no authorization for such delegation, and therefore, the entire proceeding, predicated upon this order, must fall as being without a foundation.

The so-called Pandering Law, 39 U.S.C. Section 4009, gives complete discretion to the complaining addressee to determine whether the advertisement occasioning the Prohibitory Order (hereinafter sometimes "PO") is indeed a pandering advertisement. Of course, many complaining addressees, whose libido is aroused by non-sexual materials or who are eager to shut off the mailed flow of advertisements, have certified that an advertisement is a pandering one, when to a more reasonable person it might appear that such an advertisement was not pandering, i.e., neither erotically arousing nor sexually provocative. Thus, according to the Report of the Commission on Obscenity and Pornography (Bantam Books Edition, 1970), at p. 133:

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> "Prohibitory orders have been issued against nearly 400 separate business firm names mailing sexually oriented materials; orders were also issued against dozens of business firms advertising nonsexual products."

However, according to information we have received, the Government has not sought even one Court order to enforce a postal prohibitory order against any of the dozens of business firms advertising nonsexual products. It has sought Court orders only when the first mailing was -- in the judgment of the Post Office -- pandering, i.e., of a sexually provocative or erotically arousing type. Thus, for example, I have received information, and therefore allege, that while prohibitory orders have been obtained against mailings made by such organizations as the American Civil Liberties Union and the Practicing Law Institute -- neither of which mail any material which could conceivably be called sexually provocative or erotically arousing -- the Post Office and its successor, the Postal Service, have completely failed to go into Court to seek a Court Order enforcing a PO, even when there has been a violation of the PO. We defy the Government to show otherwise.

Thus, the Government has been selectively determining in which cases it should seek a Court order. Since nothing

can happen to a mailer unless and until he violates a Court order, it is quite clear that Post Office censorship is now being used in the place and stead of the discretion of the complaining addressee. Thus, the First Amendment is violated, because as construed and applied, and in its operation and effect, the law vests the plaintiff and the Attorney General with the power to make discretionary evaluations of material, and to determine which advertisers to move against, on the basis of the type of material advertised. The underlying statute is repugnant to the First Amendment and deprives defendant of its First Amendment rights, and is further repugnant to the due process clause of the Fifth Amendment, and further deprives defendant of liberty and property without the due process of law required by the Fifth Amendment, as well as depriving defendant of the equal protection of the laws under the said Fifth Amendment.

The administrative complaint issued by the Post Office did not state any cause of action, in that it failed to allege the date of the alleged second mailing, and in that it further failed to allege that such alleged mailing was made more than 30 days after the defendant's alleged receipt of the alleged PO.

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As construed and applied, and in their force and effect, 39 U. S. C. Section 4009 and the Rules and Regulations promulgated thereto and thereunder, are repugnant to the due process of law clause of the Fifth Amendment and to the Sixth Amendment, and deprive defendant of liberty and property without said due process, and of its right under the Sixth Amendment to a trial by one who is impartial, to be informed of the nature and cause of the accusation, to confront and cross-examine the witnesses against it, and to have compulsory process for obtaining witnesses, the defendant not being given the "full hearing" afforded him according to the decision of the Supreme Court of the United States in Rowan v. United States Post Office Department, 397 U.S. 728 (1970), for the following reasons:

In every Post Office hearing, the hearing officer--an employee of the Post Office which is bringing the complaint--has been the prosecutor, the judge, the jury, and, to the extent to which he has introduced in evidence varying papers, a witness. Wherever the Post Office has purportedly determined that defendant or someone acting in its behalf has violated a PO, such determination has been made without the testimony of any person whatsoever identifying any materials or the dates of their being received or sent, thus without

any legal evidence whatsoever. Despite repeated demand made therefor by the defendant here, no complaining addressee has ever been produced at an administrative hearing, nor has any such person's testimony been permitted to be taken by deposition after due and proper requests therefor, the Post Office disregarding its own rules and regulations in regard thereto, and consistently failing to give any information whatsoever on how its own rules and regulations are being implemented. It is our understanding that the Post Office has never even inquired as to the willingness of the complaining addressee to appear and give testimony at a Post Office hearing. Thus, any mere indication by a complaining addressee, or any written (but invariably unsworn) statement by the complaining addressee,as to the date of receipt of the second mailing, has been accepted as uncontrovertable Gospel truth by the Post Office, with no opportunity being given to the defendant to show error or hostility on the part of the complaining witness.

Insofar as the plaintiff may rely upon the presumption of 39 U. S. C. Section 4009(f), such presumption is arbitrary, capricious, unwarranted and unreasonable, especially in view of the notoriously poor mail service of the last several years.

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The defendant has been denied its right to a hearing before the Post Office, and, unbelievable as it may sound, the Post Office has in effect taken a default against my client by reason of its own inefficiency, by reason of its own inability to properly transport the mail to itself. The Pandering Law requires that a demand for a hearing be filed with the Postmaster General within 15 days after the PO has been received by the mailer. The Post Office immediately began violating this provision of the law, by requiring the demand for a hearing to be addressed not to Postmaster General, but to the local Postmaster, or to someone at a local Post Office; this is clear from an examination of the text of the complaint issued by the Post Office. Thus, it was improper for the Post Office to take a default in any situation, since it required a filing with the wrong official.

Nonetheless, at the time that the administrative complaint was issued in this case, I had followed the following procedure:

The latest stamp on the back of the envelope containing the administrative complaint, I reasoned, was the earliest date upon which the PO was delivered to client; certainly, it was a reasonable date to measure from, since obviously the Post Office could not have put a stamp on the back

of the envelope after it had parted with its custody. Accordingly, when received from client, it was my practice to make a notation as to the deadline date for mailing in the demand for hearing, based on the latest Post Office stamp. Where a stamp showing date was put on by my client, I measured from this date of receipt. I calculated this date as being 14 days from the latest date stamped on the back of the envelope, except where the 15th day would fall on a Monday, and I would note my deadline as being the Friday preceeding that Monday. Appropriate adjustments were made if a holiday intervened. I would then make it my business to mail out my demand for a hearing on or prior to that deadline date.

This was my practice for many many months. The Pandering Law's effective date was April 14, 1968. I had no problems whatsoever with my practice until sometime in 1969 when I noticed that, although I was following my prior plan of action, I was suddenly the recipient of defaults all over the place.

Upon inquiring as to why these defaults were being taken, I was orally advised by Post Officials (just who advised me, I do not now remember) that the Post Office had adopted a new construction of the statute, that they had now decided that they were going to take the words of

the statute literally, and if the demand for hearing was not actually "filed" by arrival at the particular Postmaster's office on or before the 15th day, this would be considered a default. I protested that even Internal Revenue Service, when it requires that you file a certain tax return by a certain date, considers you to be on time if your mailing envelope is postmarked on the day set for filing, and that the Post Office was now claiming that it could put me in default by being slow and inefficient in the delivery of mail to itself. My protests were to no avail. Annexed hereto are copies of my correspondence in this regard, which were sent.

I might also perhaps add that I was extremely careful to always have my demand for hearing sent out on the date that the demand for hearing bore; that demand for a hearing was sent out, though it is not reflected in the "certified" file submitted by the Government, on the day indicated on the demand for hearing, (copy annexed) and there was thus absolutely no reason whatsoever why, in equity or logic, the Post Office took a default solely because of its own inefficiency in delivering mail to itself.

In this connection, I note also that in this very case, I took an appeal from the decision denying

a hearing as evidenced by the correspondence annexed hereto. So far as my records now show, that appeal was never acted upon. Thus, this proceeding is being brought to enforce a PO while an appeal is still pending in the Post Office Department.

The above also demonstrates that the file submitted by the Government herein is woefully incomplete.

The Government purports to proceed upon what it terms, in its notice of motion, an annexed certified copy of the record of the proceeding in the Post Office Department. However, the certification which is annexed is totally defective, in several respects, as is set forth in detail in our memorandum of law to be submitted herewith. Thus, no evidence has been presented to the Court upon which it could base an order; the Government's motion must be denied, and summary judgment awarded to defendant.

Further, we note that the certification is remarkably lacking in stating which officer has legal custody of the record. All "certifications" seem to be made by an official in Washington, D.C. Yet this official is <u>not</u> the one who has either actual or legal custody of the record. On the contrary, "Files relating to the issuance of these prohibitory orders (325,000 issued

between 4/14/68 and 12/31/69) are maintained in 64 postal service centers across the country and contain the complaints, the offending material, and the resultant prohibitory order." Vol. III, Technical Report of the Commission on Obscenity and Pornography, p. 161.

Even were a certification here to be proper and legally correct, it would nonetheless not afford a basis upon which any factual findings could be made and an injunction issued, for the certification merely certifies "that the annexed documents constitute true copies of original records which are in the official custody of the Post Office Department, to wit," then reciting the Post Office Docket number of the case and the name of the complaining addressee. Thus, the only papers which are certified by the Government are, at most, the papers which would contain the docket number, and yet, such papers standing alone cannot possibly spell out any violation of a prohibitory order. For until the issuance of the administrative complaint by the Post Office, no papers bear a docket number, nor has the docket number of the case been put on any papers ante-dating the administrative complaint. Therefore, there is no certification of the record insofar as the issuance of the underlying prohibitory order, or

the date of its receipt by the defendant. Since the date of receipt is crucial in determining whether the prohibitory order has been violated, its effective date being 30 days after its receipt, there is, in the absence of any certification of the prohibitory order and the return receipt therefor, a complete lack of any proof of the date of the receipt of the prohibitory order. Thus, the entire case must fall as being without a foundation. Moreover, the paper supposedly containing some proof of the date of receipt of the second mailing does not contain the docket number of the case; thus, it has not been certified. Similarly, the return receipt showing the alleged date of receipt of the administrative complaint does not bear the docket number of the case. Thus, there is simply no proof whatsoever as to the receipt of the administrative complaint. There is nothing to show, accordingly, that the defendant was accorded its procedural rights under the statute.

The Pandering Law, as it existed at the time of the alleged violation complained of here, did not require merely that a prohibitory order be issued as an order of the Post Office, or its present successor the Postal Service, but required that the prohibitory order be issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General.

In the case at bar, the prohibitory order was not issued by the Postmaster General. It was not even issued by a local postmaster. It was issued, on the contrary, by the Director of Administrative Services. We are not aware of any delegation to such an officer of the power to issue a prohibitory order, and if there was any such delegation of authority, pursuant to any rule or regulation, we are aware of no statute which would authorize such delegation to the Director of Administrative Services.

We turn next to the problem of whether, even assuming that the record is properly certified and that the so called evidence of date of receipt of the second mailing was admissible, -- both assumptions being purely for purposes of argument, -- a violation of the prohibitory order has been made out. We note, at the outset of this facet of the argument, that there is completely lacking any proof whatsoever of the date of the second mailing, that such date was never alleged, and that therefore the defendant was never accorded due process of law under the Fifth Amendment and the right to know the nature and cause of the accusation

against it under the Sixth Amendment. Just as significant, however, is the fact that the second mailing bears no postmark whatsoever. Thus, the Government is forced to rely upon the statutory presumption found in Section 4009 (f), that a mailing received more than 30 days after the effective date of prohibitory order is presumed to have been sent in violation of the order. But, as we show in our brief, the effective date of the order is 30 days after it has been received, so that there is no presumption of a violation unless the second alleged mailing was allegedly received 60 days or more after the date of receipt of the prohibitory order.

In the case at bar, the Government's proof is equivocal. The alleged date of receipt of the prohibitory order by the defendant was May 9, 1969 , while the alleged date of receipt of the second mailing by the complaining addressee is set forth as being approximately, or on or about July 10,'69--which means that it could have been received within the 60 day period, or could have been received after the 60 day period. Thus, the Government cannot prevail by a preponderance of the proof, since it cannot have the benefit of the statutory presumption in view of the equivocal alleged statement of the addressee

as to when the second mailing was allegedly received. Therefore, summary judgment should be denied to the Government. Moreover, we urge that summary judgment should be granted to the defendant; upon trial, the memory of the complaining addressee as to the exact date of receipt of the second alleged mailing would certainly be no stronger today than it was three or four years ago, contemporaneous with the event. It would be foolish to waste the time of Court and counsel with any trial of this cause.

We come next to the question of admissibility of the evidence of the alleged date of receipt of the second alleged mailing. In view of the improper certification of the record, we do not see how such proof can be admissible in any event; it is completely unsworn to, and it is the rankest kind of hearsay. The Government, in its brief, has not attempted to sustain the admissibility of this evidence. We expect, however, that the Government will urge that, assuming proper certification, it is admissible under the Federal Business Records Act (28 U. S. C. Section 1732 (a)) as a record kept in the ordinary course of business, it being the ordinary course of business to keep such records. However, as we show in our brief, since the business involved

is that of the Post Office, and the entries as to alleged dates of receipt were made by third persons, not by the Post Office, such rule does not apply. Moreover, even if such a rule did apply, in a normal case, it would not be applicable here, for this reason:

The normal reason fo permitting evidence of business records to be admitted is that such records are inherently reliable. But in a prohibitory order-pandering case, we submit, such evidence is inherently unreliable. For several reasons, as follows:

a) The type of person who goes to the time and trouble of going to the Post Office to obtain a prohibitory order rather than merely tear up the material which offends him, especially when -- as here -- he has been given notice of the contents of the envelope (see the right hand bottom of the mailing envelope), is obviously the type of person who is sorely offended by sexually oriented material, the type of person, indeed, who very well might, usually does, wish to see as much trouble caused to the mailer of such material as possible, even when, as here, the material involved has been held to be not obscene. This is graphically illustrated, despite all the hypocrisy of the Pandering Law, in the statement of one addressee, in

the case purportedly pending in this Cou of United States v. Pent-R Books,72 C 606, where the addressee noted as follows on the notice (request) for prohibitory order:

> "I request more than this (see below). This form evades the real issue. I have no minor children in my home, but YOU know this literature is reaching homes that have minor children. I AM NOT CONTENT WITH MERELY STOPPING THIS TYPE OF PORNOGRAPHIC MAIL FROM REACHING MY HOME; I EXPECT THE POST OFFICE AND JUSTICE DEPTS. TO FLUSH OUT THE SOURCE OF THIS OBSCENE MAIL, GET HIM OR THEM IN PRISON, AND STOP ANY OF THIS STUFF FROM BEING MAILED OUT AT ALL."

Similarly, in another purportedly pending case, in the memorandum from the Post Office Dept. dated June 3, 1969, the Postmaster recites that the complaining addressee, Mr. Griffis,

> "...is very concerned about this type of literature in the mails and offers his assistance and cooperation in trying to rid the mails of it."

And this is very obviously the attitude of the Post Office.

b) There may be community pressure, pressure by Post Office officials, or even by the local Postmaster or postman to attempt to make out a violation of a prohibitory order in order to cause more trouble for the mailer, in this emotionally-charged situation. The defendant is precluded from obtaining an examination of the complaining addressee in order to determine this, and there is simply

no way in which the defendant can ever obtain such information. But this has happened. Graphic and dramatic proof of this -- of a direct Post Office attempt to influence an addressee to set forth a false date of receipt of mail so as to be able to find a violation of a prohibitory order, -- was accidentally uncovered during a hearing in another case involving this very defendant.

Thus, in the Post Office case entitled "In the Matter of: Violation of Prohibitory Order No. 633, issued against Pent-R Books, Inc., Respondent, on behalf of Thelma M. Moser, Complaining Addressee, by Postmaster, Phoenix, Arizona," Post Office Docket # R14-Pa64-633, Gary Langer, Esq., then of my office, at the Post Office hearing, asked to look at the original folder. Upon it being examined, Mr. Langer noted that in the file, there was a card, obviously prepared by the Post Office, the bottom of which purported to show the date of receipt reading:

> "On August 27, 1969, I, Thelma Moser, received from the Pent R Book (sic) a second letter",

apparently signed by Thelma Moser. But immediately preceding this legend, also obviously prepared by the Post Office -- which had failed, however, to cut it off -- appeared the following:

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> "In order to make a case against this firm we must have signed statement as to date of delivery of the second letter. The date given is an estimated date, but will give us the correct waiting period to carry on this complaint. An envelope is supplied for your convenience and no postage is necessary."

A Xerox copy of the card is being filed with this Court in United States v. Pent-R Books, Inc., 69 C 1362.

That this came from the Post Office is quite clear -- no one else would or could have given this "information" and supplied a postage-free envelope. The Post Office's clear motive was "to make a case against this firm (defendant)", and the date given was an estimated date, obviously "estimated" by the Post Office in order to give them "the correct waiting period to carry on this complaint." Thus, the alleged date of receipt of the second mailing in that case was a totally fictitious date that the Post Office itself "estimated" in order to show a violation. (How could the Post Office make an estimation of that which was not within its own knowledge?) It will be noted that the alleged date of receipt, August 27, 1969, was completely typed in on the same typewriter which had written the instructions, and was obviously not done by Thelma Moser. Filed in 69 C 1362 will be a photocopy of the transcript of the stenographic minutes of the Post Office hearing on this matter.

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In the complete absence of any opportunity to cross examine Thelma Moser, or the Postal officials involved -- an opportunity constantly requested by us, but always denied in each and every case, -- the defendant is simply at the mercy of the Post Office, when the Post Office thus unilaterally decrees the alleged date of receipt of the second mailing, to get a correct waiting period to carry on its complaint. The Post Office obviously picks a date convenient to show, in their legal judgment, a violation. How widespread this practice has been by the Post Office, it is impossible to determine. (We should also note that the Post Office has consistently taken the position that receipt of a second mailing more than 30 days after receipt of the prohibitory order presumptively establishes a violation; though this position is incorrect, it explains why the Post Office does not always suggest a date of receipt of the second mailing more than 60 days later.)

Of course, this shows that when the Government seeks equity here, it does not come into Court with clean hands. Its hands are despicably defiled by its covert attempt to frame the defendant in the Moser case, an attempt disclosed only through its carelessness in not cutting off the top of the card in this instance. While this is not one of the cases presently pending in which summary judgment

is sought, the simple fact is that there is no investigatory tool whatsoever by which we can ascertain how widespread this practice is and was. Denied the right to confront and examine a complaining addressee, which we contend is a denial of liberty and property under the due process clause of the Fifth Amendment and the denial of the right to cross examine and confront defendant's accusers under the Sixth Amendment, but with the proof of at least one attempted frame-up, we submit that the Government must either submit all of its complaining addressees and Postal Officials to confrontation and cross examination, or that equitable relief should be denied by the Court.

In my affidavit, I note that the Post Office hearing examiner sits as the witness, judge, and jury. An examination of the transcript of the minutes in the Moser case shows the vice of such multiple roles being combined in one person. The hearing officer was David S. Kelson, Esq., an attorney for whom I have the greatest respect and admiration. Yet even Mr. Kelson, when faced with indubitable proof of the Post Office framing a defendant, rose to the defense of his employer, the Post Office. It is, under the circumstances, a severe denial of due process to permit the same person to be witness,

judge and jury, especially when he is employed, as here, by the same Department which makes the accusation of violation.

Thus, whatever exception there might be based upon inherent reliability of business entry records is totally lacking in this case. In this day of revelation after revelation of improper conduct on the part of highest Government officials, and with at least one Postmaster having been found out to attempt to obtain false statements as to date of receipts of second mailings, it would simply ludicrous to hold that there was any inherent reliability in the alleged statement by an addressee of the date of receipt of the second mailing.

The alleged receipt purporting to show the date of receipt, purportedly signed by the complaining addressee, does not clearly show the date it was received. It merely recites "received," or a word or words to such effect. The next line sets forth the name of the addressee. This may well show the date the Post Office received the material from the complaining addressee, rather than the date that the complaining addressee received the second mailing from the defendant. It certainly is not proof that this was the date of receipt by the complaining addressee of the defendant's second alleged mailing.

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The writings purporting to indicate receipt by the signatory contain what are apparently two different handwritings, one handwriting showing the alleged date of receipt, and one showing the signature underneath. Since these are in apparently two different handwritings, it is impossible to tell whether or not the date of receipt was perhaps inserted by the Post Office, rather than by the addressee himself. It may be that a trial would disclose this, with an opportunity to examine the complaining addressee, and hence summary judgment should be denied to the Government.

While the law as quoted in the Government brief now permits a complaint to be issued by the Postal Service, it is nonetheless true that the statute as it existed at the time of the issuance of the complaint in the case at bar required that the complaint be issued by the Postmaster General. So, too, with the order determining the violation. But in the case at bar, the Postmaster General did not issue the administrative order finding the violation, or any administrative order.

On the contrary, neither the complaint nor the order were issued even by a local Postmaster, but were issued by the Director of Administrative Services.

There has been neither showing nor claim that there was any statutory authority -- palpably lacking -- for the delegation by the Postmaster General to such person, an authority which would seem to be singularly lacking, in view of the fact that recommendation has been made to the Attorney General to seek a Court order upon the say-so not of the Postmaster General, a Cabinet officer, but on the say-so of a minor functionary. If there be such a delegation of authority, we are unaware of it, and further unaware of any statutory or other basis for such delegation.

Finally, we note that the prohibitory order and the complaint issued out of the Post Office not at Old Tappan, New Jersey, the address to which the first mailing was made, but out of Newark, New Jersey. We submit that the Postmaster at the latter city has no jurisdiction over mailings to the former city.

This affidavit has been particularly directed towards the particular facts in this case. We also submit herewith an affidavit by Richard S. Schwartz, which will be filed in every one of the presently pending Pent-R cases,

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which attacks the proposed relief requested by the Government on numerous other grounds, common to all of the cases pending in this Court, against this defendant.

For the reasons stated in this affidavit, as well as for the reasons set forth in Mr. Schwartz' more generic affidavit, we submit that the Government's motion for summary judgment should be in all respects denied, and that our cross motion for summary judgment should be in all respects granted.

Sworn to before me this

6th day of November, 1973

HERBERT MONTE LEVY

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 1975

1210a

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

DEMAND FOR HEARING, ETC.

TO: Postmaster
Joseph J. Benucci
Newark, New Jersey 07102

FROM: Herbert Monte Levy, Esq.
295 Madison Avenue
New York, New York 10017

RE: PENT-R BOOKS, INC.
ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7839-138

DATED: August 6, 1969

Client has received the Complaint in the above matter, dated July 22, 1969 . We hereby demand a hearing, and further request pursuant to Rule 956.10, that this matter be consolidated with the many other Complaints involving client pending across the country, involving the same or similar mailings, and removed to New York for hearing. Our demand for change of place of the hearing is made pursuant to Rule 956.6, not only to satisfy jurisdictional requirements, but to avoid questions of unconstitutionality. Moreover, it is our understanding that your practice is to present no witnesses whatsoever at the hearing though we will have numerous witnesses including varying personnel of client, to testify as to precautions taken and precautions possible to prevent violations of the Prohibitory Order, and whether, if there was a violation, the violation was intentional, inadvertent or preventable. We further intend to have one or more witnesses from this area to testify as to the arbitrary and unreasonable nature of the underlying statute, and hence its unconstitutionali both on its face and as applied to this case, based upon their expertise in the mail order business. For a further explanation of our claims in this matter, we enclose herewith a copy of an Answer filed in a pending case (prepared by undersigned) entitled United States v. Book Bargains. [If such a copy is not enclosed herein, we note that a copy thereof was previously furnished to you in Book Bargains, Inc. ads. P.O. (Wilber), P.O. Docket No. NK-68-2685-3 We hereby incorporate by reference all points made in the said Answer and make the same defenses and objections as are made therein.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

We demand that the complaining addressee appear to testify and be cross-examined, or, in the alternative, that the Complaint be dismissed. Kindly advise us if the complaining addressee will appear, simultaneously with or before we receive the Notice of Hearing, so that we may determine within five days of the receipt thereof whether to take testimony of the complaining addressee by deposition. Denial of the right to confront and cross-examine would be in violation of client's Sixth Amendment rights.

In order to assist our determination as to whether to take deposition, kindly advise as to who the "Deposition Officer" will be under Rule 956.8, his fees, and the authority for Post Office contention as to payment of fees and expenses of witnesses, and the amount thereof, since we have been unable to find any law requiring such payment. We further request and demand that the deposition be taken in New York City. We further demand to be advised whether the addressee was is a Post Office Inspector, working for the Post Office, affiliated with it, or influenced by it.

In order to assist in the coordination of the numerous cases pending across the country re client involving the same or similar mailings, we are sending copies of this letter to the Assistant General Counsel of the Mailability Division of the United States Post Office in Washington, as well as to the Postmaster General.

We hereby demand dismissal of the Complaint for the following reason(s):

1. The underlying legislation authorizes Prohibitory Orders and Complaints to be issued by the Postmaster General. The order and complaint here were not issued by the Postmaster General. There has been no delegation of authority by the Postmaster General, and any such delegation would be in contradiction of the statute. We accordingly take the position that the Prohibitory Order and Complaint here are nullities. If either the Order or the Complaint were issued by someone other than the local Postmaster, our contention applies a fortiorari.

DEMAND FOR HEARING, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

2. The Complaint fails to allege or show the date of the alleged second mailing. Since a second mailing would violate the Prohibitory Order only if sent more than 30 days after the receipt of the Prohibitory Order, the Complaint fails to state a cause of action; there was no foundation for the issuance of the Complaint in the first place. Moreover, failure to advise of the alleged date of the alleged second mailing denies client's Sixth Amendment right to know the nature and cause of the accusation against it, and deprives it of liberty and property without due process in violation of the Fifth Amendment.

3. The only document attached to the complaint was the original Order. It is, therefore, impossible to determine whether the Order was violated. Thus, client has received inadequate notice, depriving client of the constitutional right set forth in Paragraph "2" above.

Herbert Monte Levy

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY.

September 2, 1969

William Lawrence, Esq.,
Assistant General Counsel
Post Office Department
Mailability Division
Washington, D.C.

Dear Mr. Lawrence:

Re: Pent-R Books, Inc. ads. P.O. (Gladden)
P.O. Docket No. R8-KC-29

" " ads. P.O. (Kiyak)
P.O. Docket No. NK-69-7839-138

" " ads. P.O. (Messer)
P.O. Docket No. R5-P-277

" " ads. P.O. (Sellers)
P.O. Docket No. PH-69-4444-69

" " ads. P.O. (Walsh)
P.O. Docket No. NK-69-7207-134

TRU/ART Distributing Corp. ads P.O. (Daum)
P.O. Docket No. BOS-P-69-24

Again, please consider this as a notice of appeal in each of the above matters for the hearing denials therein, and a brief in support thereof, incorporating my prior arguments by reference.

This time, I am particularly appalled by the hearing denial in Kiyak, where the demand for hearing was mailed to Newark 12 days after receipt of the complaint. This means it took at least four days for the letter to arrive -- I can drive to Newark from my office in 25 minutes.

EXHIBIT, ANNEXED TO AFFIDAVIT OF HERBERT MONTE LEVY

 September 2, 1969

I am also somewhat puzzled by the hearing denial in Messer, dated August 20, 1969, inasmuch as an Order had already been made dated August 1st, which I appealed to you in my letter of August 11, 1969.

Can't we clear up all these items?

Sincerely,

Herbert Monte Levy

HML/mol

AFFIDAVIT OF RICHARD S. SCHWARTZ IN OPPOSITION TO GOVERNMENT'S MOTION AND IN SUPPORT OF DEFENDANT'S CROSS-MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

PENT-R-BOOKS, INC.

Defendant.
----------x

ANSWERING AFFIDAVIT OF RICHARD S. SCHWARTZ.

Docket #
72 C 600

STATE OF NEW YORK)
: ss.:
COUNTY OF KINGS)

RICHARD S. SCHWARTZ, being duly sworn, deposes and says that:

I am and at all times hereinafter mentioned have been the Secretary of defendant PENT-R BOOKS, INC., sued herein as PENT-R-BOOKS, INC. as well as of RAS ENTERPRISES, INC. This affidavit is submitted in opposition to the Government's motion for summary judgment herein, and in support of defendant's cross-motion for summary judgment. I am fully and personally familiar with all the facts set forth herein.

AFFIDAVIT OF RICHARD S. SCHWARTZ

EXTRAORDINARY PRECAUTIONS TAKEN BY DEFENDANT TO AVOID OFFENDING RECIPIENTS OF ITS MAIL.

Upon the outside of all mailing envelopes sent by defendant, or upon the outside of an inner sealed envelope, there had always appeared a notice advising the recipient of the nature and content of the advertisement contained therein.* If the recipient did not want this material, he merely marked the envelope "Refused", as invited to by defendant, initialed it, and returned it to the postman or dropped it into a mail box which he was sure to pass sometime during the day, all at defendant's expense, after which defendant removed the addressee's name from its mailing list.

Defendant had thus avoided the necessity of an addressee viewing materials which he preferred not to be exposed to, unlike the requirements of the Pandering Law where, if the complaining addressee is to be at all honest, he must open and view the materials. We had also avoided the time consuming necessities inherent in the addressee obtaining

* This practice ceased in 1970, when the Goldwater Amendment to the Postal Reorganization Act of 1970 required the legend "Sexually Oriented Ad" to appear on the envelope or on an inner sealed envelope. Defendant then followed that law. See Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp.297 (E.D. N.Y. 1971).

the Prohibitory Order and following through for a complaint. We emphasize that defendant had always done this -- starting long before the effective date of the Pandering Law.

Defendant has thus always been extremely careful of the sensibilities of persons who might otherwise be offended. Incidentally, lest the Court think that the more than 200,000 prohibitory orders that have been received by the defendant seem excessive, we note that defendant has mailed perhaps more than 10,000,000 advertising pieces, and thus the percentage of prohibitory orders received by it from all its mailings is some 2%. And though some 200,000 people purportedly objected to our ads, more than 450,000 copies of the book advertised have been sold. We further note that the advertisements, involved herein, for "The Photographic Manual of Sexual Intercourse", have been ruled non-obscene and constitutionally protected by Judge Masterson of the U. S. District Court for the Eastern District of Pennsylvania, United States v. Stewart, unreported, Crim. No. 69-162, Order dated October 13, 1971. Under these circumstances, we note that if 39 U.S.C. §4009 or its successor be applied to the defendant, who is shown here to be engaged solely in

publishing, selling and distributing materials protected by the First Amendment, with a warning notice described above, such application is unreasonable, arbitrary and capricious, repugnant to the due process of law clause of the Fifth Amendment and to the First Amendment, and deprives defendant of liberty and property without due process of law and constitutes an unreasonable, capricious and arbitrary restraint on First Amendment rights, especially in view of the severe limitations on First Amendment rights necessarily encompassed in any attempt to avoid a conflict with 39 U.S.C. §4009 -- as we shall show below. For the price of compliance with §4009, as we note below, is that many mailings cannot be made to persons who wish to receive such mailings, and therefore the statute prevents mailings to persons who desire to receive them, thus interfering with their -- and defendant's -- First Amendment rights -- a possibility never considered by the Supreme Court of the United States in Rowan, a case which was instituted in the early days of the Pandering Law, without any opportunity whatsoever for the Supreme Court of the United States to have any but the sketchiest information on how the law worked out in practice.

AFFIDAVIT OF RICHARD S. SCHWARTZ

SINCE THE DEFENDANT HAS NEVER WILLFULLY VIOLATED A PROHIBITORY ORDER, AND SINCE THE DEFENDANT HAS TAKEN ALL POSSIBLE PRECAUTIONS TO AVOID SECOND MAILINGS, INCLUDING DEPRIVING PERSONS WHO WISH TO RECEIVE ITS ADVERTISEMENTS OF THE RIGHT TO DO SO, AND SINCE DEFENDANT NOT ONLY DOES NOT THREATEN TO MAKE AN ADDITIONAL MAILING BUT HAS MADE IT VIRTUALLY HUMANLY IMPOSSIBLE TO DO SO, AN ORDER SHOULD NOT ISSUE ENFORCING THE PROHIBITORY ORDER.

The so-called Pandering Law went into effect on April 14, 1968. At that time, no one knew for certain what its operation and effect would be. But after more than 5 years of experience with this law, the defendant knows, and shall hereinafter demonstrate to this Court, that this law cannot be complied with except by disregard of defendant's own First Amendment rights -- which defendant has had to disregard in order not to be in conflict with the law. We thus claim that the law, so construed and applied, in its operation and effect, does violate the First Amendment.

At no point whatsoever did defendant ever willfully make a second mailing in violation of a prohibitory order; at the present time, and for at least the last three years, because of the computerization that the defendant has used, we submit that not only does defendant have no intent of

violating the prohibitory order here, but it could not do so even if it wished. It is our contention that in the complete absence of any willfulness in the second alleged mailing, plus the fact that there cannot be a willful mailing hereafter, an order of this Court should not issue.

As we shall show in some detail at length below, there is no doubt of defendant's good faith and diligence in attempting to comply with the Pandering Law. The cases involved here all deal with second alleged mailings in 1969, in which year Pent-R made about 10,000,000 mailings. But long prior to the 1968 effective date of the Pandering Law, we had set up a computerized system, solely in order to be able to completely comply with the terms of the law. That system was set up by the President of defendant, Ronald A. Stewart, with my assistance, through arrangements made with a computer house and a system was devised as shall be set forth below. The cost of running that computer operation in the year 1969 was some $62,068. We are advised by the computer house, that it now estimates that it used the services of the equivalent of 25 people working full time for 6 months -- which it computes as the equivalent of one person working

3000 days, or 24,000 man hours -- in order to set up and process the system. As we note at length below, difficulties were encountered because of the use of rented lists, and rented lists were finally abandoned unless they were on computer tape, where the computer could prevent second mailings. The computer operation became more and more refined as we had more experience with it. The use of duplicate mailing labels was eliminated in 1970, when it was found that this resulted in violations of prohibitory orders. The system itself was finally programmed in 1971, and is still carefully programmed, to guard against second mailiings to such an extent that the computer eliminates even mailings that have not been prohibited. Thus, as we learned of mistakes which took place, we corrected them at once, and took vigorous steps to prevent recurrence of these mistakes or further mistakes in the future. The new system of control greatly improved the situation. It is and has been as nearly perfect as a system can be.

Even originally, as we first set up the computer programming, we had a great rate of success with it. Thus, although we received something more than 200,000 prohibitory

orders, the complaints of violation which have so far been upheld by the Post Office -- which bends over backwards to be fair to itself, -- number only approximately 500. Thus, even giving the Post Office the benefit of every doubt, even now the Government charges that only some one quarter of one percent (0.025%) of the prohibitory orders issued to Pent-R were violated. Moreover, every time we have received a complaint from the Post Office, we have once more fed the name and address of the complaining addressee into the computer, so that no further mailings would be made to such complaining addressees. We have fed these names and addresses into the computer for a third time upon receipt of a Complaint filed in this Court.

Even if an injunction were issued in this case, it would and could have no effect by way of insuring better compliance in the future. With all the efforts we have made, it would be unjust to us to do so, in view of our good faith, and not in the public interest.

Actually, our success ratio is even better than the figure of 1/4 of 1% violations -- or 99 3/4% compliance. Thus, we note the following: All mailings for defendant were

handled by another corporation, RAS Enterprises, Inc., of which Mr. Stewart is again the President and I am again the Secretary, as here. The mailings made by RAS Enterprises, Inc. are almost all of a nature that some would undoubtedly find erotically arousing or sexually provocative, so that the mailings of virtually every other corporation which had been processed by RAS have resulted in prohibitory orders. However, though we estimate that Pent-R, plus all the other corporations serviced by RAS (including RAS itself) have probably had approximately 248,500 prohibitory orders issued against them, there were only seven administrative complaints of violation issued in the first half of 1972, none in the second half of 1972, nor in the first 6 months of 1973. Since then, there have only been three administrative complaints, all issued against an affiliated division of RAS, Companion Products; no material whatsoever was furnished in regard to one of the complaints, so we are at a loss to know whether or not it was justified; in the two cases where some materials were annexed to the complaint, it is perfectly clear that the prohibitory order was not violated. Thus, though there are approximately some 248,500 prohibitory orders issued and outstanding against all such corporations, there have

been only some 10 administrative complaints of violation between January 1, 1972 and date -- an alleged violation rate of less than 0.004%*. Our computer house has estimated the expected rate of computer error to be 1/2 of 1%, so that it is plain that, by falling below this rate of error, defendand (and its computer house) have done a superlative job. There is simply nothing else that we can do, of which we are aware, to avoid offending against the statute. Our good faith effort to comply with the law is perfectly clear. I now detail the course of our computer campaign.

Of course, before the Pandering Law became effective in 1968, defendant had tooled up in order to be able to comply with it. It immediately, upon receiving its first prohibitory order, began to comply with the law, in the following way.

After a prohibitory order was obtained in the Post Office, it was opened by defendant, and dated with the date of receipt (subject, of course, to error -- a lot of them in the beginning, where we failed to put on the date of receipt).

* This rate assumes that all ten administrative complaints were valid. Since we know that at least two of them were invalid, we have at most eight valid complaints, (only one of which was received after July 1, 1972); assuming the eight are all valid, the violation rate since January 1, 1972 is cut from 0.004% to 0.003%.

AFFIDAVIT OF RICHARD S. SCHWARTZ

A photocopy of each prohibitory order was made, which was sent to the computer house, or "Listing House", while defendant retained the original for its files. At the computer house, the names and addresses of persons to whom mailings should not be made, as they appeared in the ordering part of the prohibitory orders, were typed. These were then read by a device known as an optical scanner, whose function it is to translate the written material into electrical impulses which are put, and then stored upon, a magnetic tape, in a symbolic form. The Pent-R mailing list was put up on a tape itself. When a name appearing on a prohibitory order also appeared on a tape for the Pent-R mailing list, the matching of the two tapes would prevent that person's name from being printed out by the computer on the mailing list which the computer prints out. At the same time, these were sorted out by zip codes.

Two problems became apparent. The first problem was with rented lists. The mailing lists, owned by, sold to and rented to defendant were and are lists of names and addresses of intellectual, mature adults who had previously received from others, similarly situated to the defendant, advertising or other materials similar to those disseminated by defendant.

AFFIDAVIT OF RICHARD S. SCHWARTZ

They were and are mailing lists of names of persons such as doctors, dentists, attorneys, accountants, druggists and other professional people, and owners or proprietors of various businesses thus assuring as much as possible that none of the addressees were or are minors. Because of their nature, many of such mailing lists owned by defendant, and those rented or purchased from others by defendant and others, overlap, and the names of the same persons frequently appear on both such lists.

In view of the many prohibitory orders received by the defendant, it was physically impossible to visually compare, by human vision, the names of addressees thereon with the names in any lists rented by the defendant, especially since the names on rented lists were usually listed in random rather than in alphabetical order. Since the use of an optical scanner and computer to eliminate names on a list involves the copying of the names (by their translation into symbols stored on the magnetic tape), and since the owner of the rented list will not permit that list to be copied, the defendant found that it was impossible, simply impossible, for it -- or others -- to comply with a prohibitory order insofar as the use of a rented list is concerned.

Moreover, many mailing lists were not available for purchase, being available for rental only, no matter what the price. When a list is sold, the price is many times the rental charges. The operation and the effect of the statute has been that, after defendant learned that it could not comply with the law and also use a rented mailing list, the defendant was forced to abandon the use of most rental mailing lists. It could only use a rented mailing list if and when the owner of such list had himself put the list on magnetic tape, so that the computer could be used to check off the names of persons as to whom prohibitory orders were issued and outstanding. Thus, the defendant has been forced into the position where it can mail to persons on mailing lists, which are available for rental, only if and when such lists are on tape. The defendant has followed this practice since 1970. Defendant estimates that, because of this limitation, it and the corporation which processes its mailings, and which now owns its mailing lists -- RAS ENTERPRISES, INC. -- have been deprived of the right to mail to somewheres between 5,000,000 and 10,000,000 persons. Even allowing for a 20% of overlap of names on mailing lists already used with those

on such rented mailing lists, the operation and effect of the statute has been to prevent mailings for First Amendment materials to approximately 8,000,000 persons within the United States within the last three years.

Further, in this connection, we note that on occasion, the rented mailing lists would not be delivered to the defendant or its computer house, but the owner thereof would insist upon having names and addresses on such list printed or typed by itself or others and sent to separately owned letter shops or mailers where the material to be mailed is inserted in the envelopes, or is otherwise packaged, and mailed. We have included in our estimate above such mailing lists which also are obviously unavailable to the defendant, because of its effort to comply with the Pandering Law.

We submit that the Pandering Law was not intended to apply to a second mailing made to a name on a list rented by the sender. If it was intended to so apply, then defendant, who had exercised the greatest care, would be deprived of liberty and property without the due process required by the Fifth Amendment, since the only way to avoid second mailings to a name on a rented list is by so limiting the use

of rented lists as set forth above, and thus effectively restricting the freedom of speech and press of the defendant herein.

There was a second problem which became apparent. In order to print out an entire protester-free list, the list would have had to be printed out anew at least once every 30 days. This particular aspect of the matter itself would have cost at least a minimum of $18,000 per year. To circumvent this cost, three carbon copies of each print-out were acquired at the comparatively nominal costs of $2.00 per 1,000 names. If the mailing label on the second alleged mailing is identical to that on the first alleged mailing, this occurred because the mailing was made due to the second mailing having been made before a new protester-free list could be printed out, it being impossible and illogical to coordinate dates of mailing with the effective dates of prohibitory orders.

Accordingly, in order to comply with this unconstitutional provision of the law, the use of carbon copies of

mailing labels was abandoned by defendant in 1970.* Thus, the law unreasonably and substantially illegally prohibited the use of the mails for First Amendment purposes.

A third problem which was run into was that the optical scanner cannot exercise any judgment. Thus, if the name appearing on the prohibitory order was R. A. Jones, but the mailing list contained the name of Richard A. Jones, the computer would simply not recognize the name.

To avoid this problem, and similar problems, the only way to prevent second mailings was to so program the computer that all persons with the same last name at the same address should not get mail. This was done in 1970.

Of course, the slightest variation of an address would have rendered this an illusory protection; thus, if our attorney's wife Marilyn W. Levy, Esq., who at about that time had an address of 1133 Sixth Avenue, had appeared on a different

*Such use has recently been resumed, but only to the limited extent that carbon copies are made of names and addresses only of those who have bought from us, as to whom the Pandering Law does not apply, Cf. Pent-R Books, Inc. v. United States Postal Service, 328 F. Supp. 297 (E.D.N.Y. 1971). And in any event we have finally worked out a method for their use anyhow, so as to still comply with prohibitory orders.

mailing label as having an address of 1133 Avenue of the Americas, New York City -- the same actual address, but different to a computer -- a mailing to her could not have been prevented.

In the meanwhile, the Supreme Court of the United States had upheld the constitutionality of the Pandering Law though, as we noted, without any knowledge of the operation and effect of the law. The defendant, even though it had pioneered the way in presenting a method by which an unwilling recipient could get its name removed from its mailing list without any expense and minimal effort, had to even further circusmcribe its own First Amendment rights in order to even better comply with the law.

To even better comply with the law, an improvement was made on or about November 14, 1970. Under this new system, the computer sought out the first five letters of the last name of the addressee, and automatically removed from the mailing list the name of any person at the same address who has the same first five letters in his last name -- even if such other persons had requested mailings from the sender, and even if their first names were different and were in fact different people. Thus, if one Murray Schwartz at 295 Madison Avenue,

New York City, had obtained a prohibitory order, the computer would have automatically prevented mailings to all persons at that address the first five letter of whose last name are SCHWA. Thus, in order to comply with the law, mailings to Irving H. Schwartz and Herman Schwartzman as well as to Schwartz, Schindler & Levy, all existing persons or firms at that address, would have been prevented.

Thereafter a still further improvement was made, effective in the Spring of 1971. This eliminated from the RAS mailing lists the names of all persons as to whom the following three factors also appeared in the Government list supplied under the Goldwater Amendment or in the names supplied by the Prohibitory Order:

A. The first five letters of the last name coincide.

B. The first three digits of the street address coincide, and

C. The zip codes coincide.

Thus, in addition to weeding out the names and addresses of the persons mentioned above, all persons within the zip code area (10017) whose last names began with SCHWA at any address in that zip code area which began with 295, would be eliminated from the RAS list. Thus, any Schwartz, Schwartzman,

Schwartzberg, Schwarz, etc. at 295 East 42nd or 295 East 41st, etc., etc., would not receive mail, even though some of such persons might be customers.* The problem is also solved of preventing a mailing to say,1133 Avenue of the Americas, when the address we were given was 1133 Sixth Avenue, since the numbers of the street address control. We have thus succeeded in avoiding the type of problem set forth in the annexed page from "Popular Photography."

Of course, there is still opportunity for error. A mistake may be made by the typist who types up the material for the optical scanner, in putting down the name and/or address; a mere speck of dust on a computer tape may prevent the elimination of one or many names. It is estimated that there will be a computer error factor of one half of one percent (0.5%) which cannot be eliminated. (The Government, indeed, has made many errors in the tapes it supplied RAS under the Goldwater Amendment).

* Our computer house has advised us that at Co-Op City, a gigantic housing development in New York City which our computer house programmed, there were last names duplicated in 35-40% of the cases. We note that should a Schwartz in Co-Op City obtain a prohibitory order, many hundred (possibly several hundred) other Schwartz's in Co-Op City could not get a mailing from us -- and that this would continue perpetually even after the one objecting Schwartz moved out.

I should perhaps also add that when we receive a complaint of a violation of a prohibitory order, we once again feed the name and address of the addressee into the computer, even though in almost all probability it is already on our tapes, and though the second mailing was due to matters beyond our control (e.g., the second mailing was to a new address when the Postal Service had only ordered cessation of mailing to an old address).

That our program seems to be working is evident from the fact that in November, 1971, only four complaints were issued -- one of which seems to be explainable only by computer error, two of which were caused by Post Office error, and one of which cannot be explained because we have not been furnished with sufficient documentation, according to advice from Herbert Monte Levy, Esq., our attorney. In October, 1971, only one complaint was received. So, too in September, 1971.

Thus, all of the corporations having their mail processed by RAS Enterprises, Inc. including that of Pent-R Books, Inc., in order to comply with the law, have taken precautions which result in elimination of mailings even to

persons who may desire such mailings. We would estimate that that would include some 50,000 persons.* Under such circumstances, in addition to the clear violation of its First Amendment rights, it is further clear that there would not or could not be any willful violation of a prohibitory order. Accordingly, it would seem that this case would be moot, because any judgment, when rendered, could not have any practical legal effect upon the then existing controversy. Indeed, there is simply no controversy here.

To further note the good faith of defendant, we note that, as already stated, Pent-R did attempt to comply with all prohibitory orders, constantly tightening its preventative measures designed to insure that mail would not reach those who did not want to receive its mail. Moreover, when the Goldwater Amendment came into operation, requiring that publishers disseminating sexually oriented advertisements must subscribe to a list of persons who did not want to receive

* This does not take into account persons in the Armed Forces who may be deprived of mailings, it would seem that one person named "Smith" or "Jones", by obtaining a prohibitory order, would effectively preclude all persons with such a respective last name at such APO address from receiving any mail from us. We have no idea how many persons have the same APO address; we are thus unable to come up with a figure for this problem.

such ads, defendant was the first -- and for a long time the only -- subscriber to that list, which subscription cost it $10,000 a year.* While continuing to comply with that requirement, Pent-R tested the statute before a three Judge Federal Court; during the course of those proceedings, the Government constantly modified its regulations, under the Goldwater Amendment so that that case was rendered moot and dismissed. One of the modifications followed Pent-R's practice, begun long before the statute was enacted or became effective, of giving a warning notice of the type of contents on an inner sealed mailing envelope. Pent-R Books, et al v. U. S. Postal Service, 328 F.Supp. 297 (1971). To further put this matter in context, we note that although some 200,000 prohibitory orders were issued against Pent-R, only approximately 750

*In analyzing the first such list supplied by the Government, we ascertained that 621 names on that list of 31,604 names had bought sexually oriented materials from one of the plaintiffs there on one, two, three or four occassions previously. Thus, some 2% of those on the Government list are prior buyers. Since the Government list includes names of children, if we assume 2.5 children per adult name, then some 5% on that list were prior buyers from plaintiffs there. We cannot even estimate how many on that list were prior buyers from other sources of supply. This further demonstrates Mr. Levy's thesis that persons are pressured into acting to avoid the receipt of ads for sexually oriented materials.

complaints were ever made under the Pandering Law, according to the estimate of our attorney and the informal estimates of Postal Service officials -- an alleged violation rate of 0.375% at most. Of the some 750 cases in which hearings were held, approximately 1/3 of these resulted in dismissal in the complaint, while approximately 500 of the cases so far have resulted in the complaint being upheld by the Post Office, with or without a hearing, or some alleged 1/4 of 1% (0.025%) of alleged violations.

The defendant is a thoroughly law abiding corporation. We would estimate that it has spent by this time at least some $300,000 in order to comply with the Pandering Law, as well to comply with the Goldwater Amendment. Its vast expenditures of money, made in an effort to comply with the law, show that it is not a law breaker, but a law observer. To issue an injunction in any case such as this, which has become completely moot by the use of such a computerized method that not only are mailings to protesters avoided, but also mailings to persons who are not protesters, would be to have the Court issue a useless order -- and an unconstitutional one at that.

AFFIDAVIT OF RICHARD S. SCHWARTZ

I understand that it is hornbook law that a statute must be construed so as to avoid raising questions of constitutionality. We believe that we have raised substantial questions as to constitutionality in the operation and effect of the Pandering Law -- not involved in the Rowan case --, which must be faced if this Court is to issue an order. Succinctly stated, it is a fact that the law cannot be complied with except by denying the defendant its right to communicate to those who would receive its communications, and the right of those who receive such communications to receive them. We submit that the law should be so construed in this case as to mean that there is complete mootness in the case at bar, in order to avoid the raising of these questions.

We have bent over backwards to make any possible settlement with the Government. It has never suggested any deficiency in our computerized system for compliance with prohibitory orders. It has never suggested any improvement. Since 1971, at least, it has been fully informed of our system's working. What more does the Government want from us? Our standard of attempted compliance, our actual rate of better than 99 3/4% compliance with prohibitory orders, speak

for themselves. No injunction need be granted. It could have no possible effect whatsoever. Any practical suggestions for improvements in our computerization program will be gratefully accepted. Can we do more?

I now turn to some details.

I understand that according to the purported so called certified file in this case, the purported return receipt for the administrative Post Office complaint is dated However, as noted above, it was our practice and remains our practice to stamp or otherwise indicate on the envelope in which the complaint was contained, the date of its receipt by us. The date of its receipt by us, according to the envelope, which will be annexed hereto, is July 25, 1969, though the date of receipt according to the purported return receipt is July 24, 1969. If we are correct in our date of receipt, then it is patent that the demand for hearing, which our attorney's affidavit indicates was sent on the date it bears, was sent in time, and that we were improperly denied a hearing before the Post Office Department in this case, a default having been taken without just cause. This raises an issue of fact warranting a trial.

AFFIDAVIT OF RICHARD S. SCHWARTZ

A comparison of the way in which the first mailing was addressed, that is, the physical set up thereof, to the way in which the second mailing was addressed, clearly demonstrates that the second mailing was to a name on a rented list. This is obvious because of the differences; had the second mailing been to the same mailing list as the first, the two mailings would have been identical, letter for letter, type style for type style. Since they are not so identical, it is plain that one of the mailings, probably the latter, was to a rented list. For the reasons we have set forth above, we do not believe that a prohibitory order can be violated, constitutionally, by mailing to a name on a rented list.

Finally, I note that, from the beginning, the Post Office has been in violation of its own rules and regulations and forms for practice. Thus, the standard form complaint of the Post Office Department recites as follows:

> "Evidence has been produced that the above-captioned Prohibitory Order has been violated by you [or your agents or assigns] as follows: 1. By further mailings to the addressees listed in the order. See exhibit annexed hereto."

However, in this case, all that was annexed to the complaint was a copy of the prohibitory order.

AFFIDAVIT OF RICHARD S. SCHWARTZ

It was therefore impossible, upon receipt of the complaint, to determine whether the prohibitory order had been violated and impossible to prepare a defense thereto. The complaint was thus issued in violation of the rules and regulations, failed to state a cause of action, and violated the defendant's Sixth Amendment right to be advised of the nature and cause of the accusation against him, and deprived deffendant of liberty and property without the due process of law required by the Fifth Amendment to the United States Constitution.

WHEREFORE, deponent prays that the plaintiff's motion for summary judgment be denied, that defendant be granted summary judgment dismissing the complaint, and that the prohibitory order be vacated.

RICHARD S. SCHWARTZ

Sworn to before me this
8th day of November, 1973.

GILSOM SAFDEYE
Notary Public, State of New York
No. 3425478
Qualified in Kings County
Commission Expires March 30, 19 75

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION.

UNITED STATES POST OFFICE
NEWARK, NEW JERSEY 07102
OFFICIAL BUSINESS
P-17

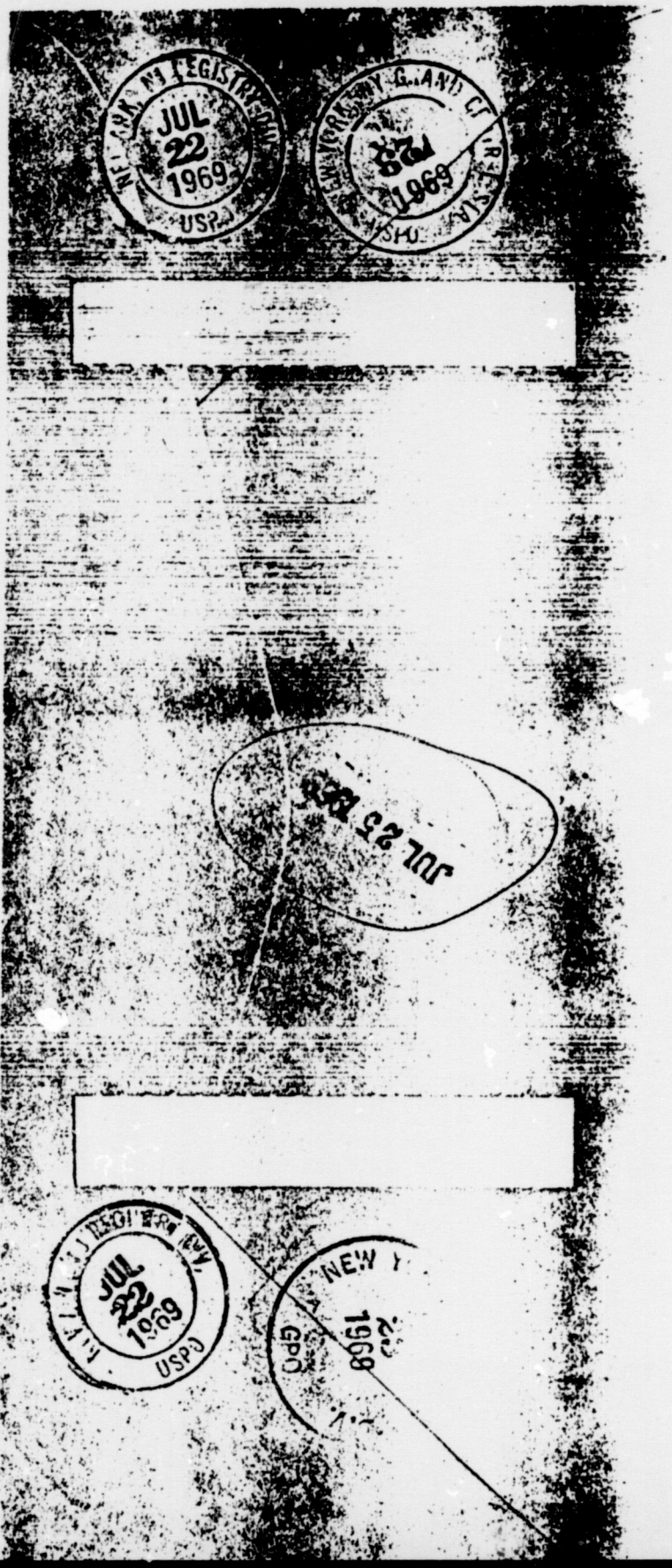
PENALTY FOR PRIVATE USE TO AVOID
PAYMENT OF POSTAGE, $300

REGISTERED
451207
RETURN RECEIPT REQUESTED

PENT-R BOOKS, INC.
P.O.BOX 1555
NEW YORK,N.Y. 10017

7139-138

EXHIBITS, ANNEXED TO DEFENDANT'S CROSS-MOTION



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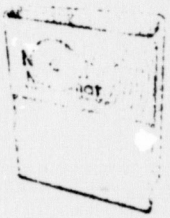

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NEWSFRONT *continued from page 14*

in convention here that Kodak is trial marketing three-solution process for color prints. It may replace present five-solution process. Kodak is concerned about water pollution and silver waste. New process "reduces effluent volume by 40 percent," has bleach-fix that is "completely biodegradable, can be regenerated and allows efficient silver recovery." Seiler said company is working hard to make non-toxic chemicals and cut level of BOD_5. He said Kodak has managed to formulate Ektaprint C stabilizer without zinc, another potential pollutant.

NEW YORK—*Our man Rothschild to speak at communication parley*: Among panelists at 15th annual Wilson Hicks International Conference on Communication Arts (formerly Miami Conference) will be *Popular Photography*'s senior editor, Norman Rothschild. Other participants at meeting, slated for April 28-30 at U. of Miami, Coral Gables, Fla., include Gilbert M. Grosvenor, editor and vice president of *National Geographic*; Erich Hartman of Magnum; Richard Grossman, president of Grossman Publishers; Tony Vaccaro of *Look*; Inge Morath, free-lance photographer and wife of playwright Arthur Miller; Burton McNeeley, undersea photographer; John Schearer, free-lance photographer; Larry Schiller, film maker; Paul Hue, photographer from Holland; Martin Duffy, manager of design and media for A.T.&T. Co.; Marcello Ablaza, official photographer to the president of the Phillippine; Dr. Wesley Clark, dean of the School of Journalism, Syracuse University; and John Olson, staff photographer of *Life*. Conference also serves as annual meeting for American Society of Magazine Photographers.

NEW YORK—*With deep regret, we note the following deaths*:

Charles Rado, founder and president of Rapho Guillumette photo agency that represents photographers throughout the world. Rado often fostered work of unknown photographers, many of whom were exhibited at Museum of Modern Art.

Dr. Emanuel Goldberg, scientist, author, and retired director general of Zeiss Ikon AG. He emigrated from Paris to Israel, where he founded laboratory for applied optics, now known as EL-OP. He wrote *The Fundamentals of Reproduction Technique* and *The Structure of the Photographic Image*.

A. Aubrey Bodine, photo director of *The Baltimore Sunday Sun* magazine, and winner of hundreds of international photo awards. He had worked with *The Sun* papers for nearly 50 years. Many of his best pictures appeared in *My Maryland*.

Kyoichi Sawada, U.P.I. photographer, killed in Pnompenh, Cambodia, while covering the war. He won Pulitzer Prize in 1966 for picture of Vietnamese mother fleeing enemy attack. ●

MEMORANDUM AND ORDER BY DOOLING, D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - -X

UNITED STATES OF AMERICA,

: 72 C 600

-against- : (KIYAK)

PENT-R-BOOKS, INC., : MEMORANDUM and ORDER

Defendant.

- - - - - - - - - - - - - - - - - - - -X

Appearances:

LLOYD H. BAKER, [illegible] United States Attorney, [illegible] for plaintiff

HERBERT MONTE LEVY, Esq., for defendant

DOOLING, D. J.

In this action to obtain an order commanding compliance with a Post Office Prohibitory Order under 39 U.S.C. § 3008 (formerly § 4009), the plaintiff has moved for summary judgment on the administrative record, and defendant has cross-moved on affidavits. The principal objections of defendant are those raised and disposed of in 69 C 1362, 69 C 1290, 72 C 606 and 72 C 609, and what has been said in those dockets need not be repeated here.

The only point made in this case by defendant apart from those passed on in the above dockets is that defendant's allegedly timely mailed Request for Hearing

MEMORANDUM AND ORDER BY DOOLING, D. J.

was ignored. It was mailed to the Postmaster at Newark, New Jersey , from New York City, fourteen days after the receipt of the complaint. In this case, however, remand to consider the timeliness of the mailing is not appropriate. The form of objections allegedly sent to the Postmaster raised no points not [illegible] the dockets refer[illegible].

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted and defendant's cross-motion is denied. A form of judgment has been approved for entry by the Clerk.

Brooklyn, New York

July 26, 1974.

U. S. D. J.

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
- -X

UNITED STATES OF AMERICA,

-against-

PENT-R-BOOKS, INC.,

Defendant.
- -X

CLOSED

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IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JUL 29 1974 ★
TIME A.M.
P.M.

72 C 600
(KIYAK)
JUDGMENT

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This action came on for hearing on the cross-motions of the parties for summary judgment before the Honorable John F. Dooling, Jr., District Judge, and the motion of plaintiff having been granted and that of defendant having been denied in the decision duly rendered, it is

ORDERED and ADJUDGED that defendant PENT-R-BROOKS, INC., its agents and assigns (1) refrain from any further mailings to GEORGE KIYAK or MARK KIYAK or CHRISTOPHER KIYAK, 24 De Berg Drive, Old Tappen, N.J. 07675,
or intended for the indicated address by any variation of addressee designation, such as, but not limited to, occupant, householder or resident; (2) immediately delete the above-named party from all mailing lists owned or controlled by it, its agents or its assigns; and (3) immediately abstain from any

JUDGMENT

sale, rental, exchange or other transaction involving mailing lists bearing the name of the party named above.

Brooklyn, New York

July 26, 1974.

Approved:

U. S. D. J.

Lewis Orgel

CLERK

by Thomas Blaskos

Chief Deputy